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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

October Term, 1985

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNIONS NO. 215, 297, 504, 521, 577, 709 and 762, and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNION NO. 294,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED ARTISTS COMMUNICATIONS, INC.,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Question Presented

Whether the Labor-Management Relations Act permits a party to a collective bargaining relationship to engage in a strike, lockout or other unilateral conduct without prior notification to the State and Federal Mediation and Conciliation Services as required by Section 8(d)(3) of the Act, 29 U.S.C. §158 (d)(3)?

Parties To This Action

The parties to this action are:

1. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, Southern Association of IATSE District No. 2 Locals, AFL-CIO, and its constituent Local Unions No. 215, 297, 504, 521, 577, 709 and 762, and International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, Southern Association of IATSE District No. 2 Locals, AFL-CIO, and its constituent Local Union No. 294;

2. The National Labor Relations Board; and

3. United Artists Communications, Inc.

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No.

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October Term, 1985

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNIONS NO. 215, 297, 504, 521, 577, 709 and 762, and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNION NO. 294,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED ARTISTS COMMUNICATIONS, INC.,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, Southern Association of IATSE District No. 2. Locals, and its constituent Local Unions, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on December 30, 1985.

I
OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 779 F.2d 552 and appears as Appendix A. It denied the Petitioner's Petition for Review and affirmed the Decision of the National Labor Relations Board which is reported at 274 NLRB No. 17 (1985), which is attached hereto as Appendix B. The Decision of the Administrative Law Judge of the National Labor Relations Board is attached hereto as Appendix C.

II
JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of the 28 U.S.C. sec. 1254.

The Opinion of the Court of Appeals for the Ninth Circuit was filed on December 30, 1985. This Petition is therefore timely filed pursuant to 28 U.S.C. Sec. 2101(c).

III
STATUTORY PROVISIONS

Section 8(d) of the Labor-Management Relations Act, 29 U.S.C. Sec. 158(d), is reproduced as Appendix D.

IV
STATEMENT OF THE CASE

The Petitioner, IATSE, District No. 2 and its constituent Local Unions are the exclusive collective bargaining representatives of

of United Artists' movie projectionists in the Southern California area. Its constituent Local 294 is the exclusive collective bargaining representative for the United Artists movie projectionists in the Phoenix and Scottsdale, Arizona area. For many years there were collective bargaining agreements covering those employees between the employer and the appropriate Locals of Petitioner. The collective bargaining agreements for both units expired on January 31, 1982. On December 1, 1981, District No. 2 notified the representative of United Artists that it wished to meet for purposes of negotiating the terms of a new agreement, to take effect upon the termination of the then current one.

Thereafter, from early 1982 to September 9, 1982, the parties met and engaged in negotiations regarding the Southern California bargaining unit. On September 9th, United Artists presented its final offer to the Union and notified the Union that the terms and conditions of that offer would be implemented on October 11, 1982. Similarly, from early 1982 to November 8, 1982, the parties negotiated regarding the Arizona unit. On November 8, 1982, United Artists presented its final offer to the Unions representing the employees in that area and informed them that it would implement that offer on December 6, 1982.

On October 11, 1982, United Artists unilaterally implemented the terms of its final offer in the Southern California unit; on December 6, 1982, it unilaterally implemented its final offer in the Arizona unit. It did not give notice to the Federal Mediation and Conciliation Service, nor the state conciliation service before putting the changes into effect. Those changes substantially reduced the number of jobs available to employees in the unit and the actual number of employees in both bargaining units. As a result of United Artists' unilateral conduct, the employees struck in protest.

Throughout the prior negotiations between the parties, it was United Artists, the employer, and not the Unions, Petitioners herein, which manifested an intention to terminate and modify the terms of the pre-existing collective bargaining agreements. Thus, United Artists proposed an arrangement in which projectionist employees would go from theater to theater during the course of the working day rather than working at a single facility, as had thitherto been the practice. The Unions, on the other hand, sought to maintain the pre-existing terms and conditions of employment which had obtained under the recently expired agreements, proposing a one year extension of the existing contracts. (Appendix C at p. 6, 11. 26-32).

Unfair labor practice charges were filed by Petitioners with the National Labor Relations Board. The General Counsel of the National Labor Relations Board issued unfair labor practice complaints which were consolidated by the Board. The Amended Consolidated Complaint alleged that United Artists Communications, Inc. had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. Sec. 158(a)(1) and (5), by unilaterally changing the terms and conditions of employment of its employees without giving prior written notice to the state or Federal Mediation and Conciliation Services, as required by Section 8(d) of the National Labor Relations Act, 29 U.S.C. Sec. 158(d). The matter was tried before an Administrative Law Judge of the National Labor Relations Board. On November 28, 1983, his Decision issued, finding that the employer had violated the Act by unilaterally implementing and giving effect to collective bargaining proposals covering the terms and conditions of employment of its employees at a time when the notice provisions of Sections 8(d)(3) and 8(d)(4) of the Act had not been fully complied with. Further, the Administrative Law Judge ordered the employer to reinstate its employees who were found to be unfair labor practice strikers. However, the Administrative Law Judge did not require the employer, United Artists, to make

its employees whole for their losses of wages and benefits. c.f. *Mar-Len Cabinets*, 243 NLRB 523, enforced in part, 659 F.2d 995 (9th Cir. 1982). Exceptions were filed to the National Labor Relations Board which, on February 14, 1985, issued its Decision and Order in this matter. Overruling National Labor Relations Board precedent, the Board held that the employer had not violated the Act. A Petition for Review was filed in the Ninth Circuit, which issued its Opinion on December 30, 1985, denying the Petition for Review, and affirming the Decision of the National Labor Relations Board. The Court concluded that the National Labor Relations Board's reversal of its prior interpretation of the statute was reasonably defensible: Namely, that a party which had not initiated collective bargaining negotiations could unilaterally engage in a strike, a lockout, or other such unilateral conduct without giving prior notification to the state and Federal Mediation Services.

V

THE PETITION SHOULD BE GRANTED IN ORDER TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT

The Decision of the Ninth Circuit Court of Appeals purports to decide an important question of federal law which should be settled by this Court. Moreover, it has decided a federal question in a manner which conflicts with the applicable decisions of this Court. The question presented herein — whether a party to a collective bargaining relationship may strike, lockout or engage in unilateral changes without first notifying the Mediation Services — is one which affects literally thousands of collective bargaining relationships, all of those over which the National Labor Relations Board has jurisdiction. As to each of those relationships, the present question significantly affects the rights and obligations of the parties upon the expiration of their respective collective bargaining contracts. In addition, the question presented significantly affects the public interest in maintaining labor peace. The Court's Decision

runs counter to the overarching policy of the Labor-Management Relations Act, namely, the protection of the public from the harmful effects of labor disputes by requiring the parties to resort to the Mediation Services before undertaking economic warfare. Instead, the Court Decision, it is submitted, encourages those parties to engage in "quickie" strikes or lockouts and other similar conduct, without giving the Mediation Services an opportunity to prevent such disruptions. The National Labor Relations Board's construction of the statute, which the Court affirmed, ignores both the plain language of the statute, the statutory scheme, the intent of the legislation, and federal labor policy as ennunciated by both the Congress and this Court.

Section 8(d)(1) of the Act requires a written notice of proposed termination or modification of a contract sixty days in advance of the expiration date of the agreement. Section 8(d)(2) requires the parties to meet and confer in good faith during that time. Section 8(d)(3) requires written notice to the Mediation and Conciliation Services at least thirty days prior to any strike, lockout, or other resort to economic weaponry. Section 8(d)(4) requires a "cooling off period" for at least sixty days after the notice of intent to terminate or modify is given. That sixty days period, the Board and the Courts agree, must include at least thirty days after the Mediation Services have received notice pursuant to Section 8(d)(3) of the Act. See, *Fort Smith Chair Co.*, 143 NLRB 514 (1963), enforced, 336 F.2d 738 (D.C. Cir. 1964). Where a union fails to give the requisite notifications, the employees engaging in a strike lose their status as employees and, accordingly, may be terminated.

In the present case, the National Labor Relations Board holds that the notification requirement's obligation to preserve the *status quo* set forth in the statute falls entirely upon the party initiating the collective bargaining process. This reading of the statute conflicts with its plain language. The introductory proviso of Section 8(d)(1) through (4) reads as follows:

> " . . . provided, that where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification . . . ."

It is clear that the statute prohibits unilateral conduct unless the party desiring termination or modification meets the requirements of Sections 8(d)(1) through 8(d)(4) of the Act. The plain meaning of this is that *neither* party may act unless the "desiring" party meets all of the steps set forth in Sections 8(d)(1) through 8(d)(4).

Before the present case, for many years, the Board had held that neither party could lawfully engage in strikes, lockouts, or unilateral changes in the terms and conditions of employment, unless there had been at least thirty days notice to the Mediation Services.[1] Accordingly, it was held to be an unfair labor practice for the employer to lock out its employees regardless of which party had first given notice of contract termination or re-opening. *Peoria Painting & Decorating Contractors*, 204 NLRB 345 (1973), enforcement denied, 500 F.2d 54 (7th Cir. 1974). This result was necessitated, the Board held, because " . . . affording the Mediation Services the full thirty day opportunity to assist the parties to a contract labor dispute is an integral part of the scheme evolved by Congress for achieving a higher degree of stability in collective bargaining." *Ibid.*, at 346. Similarly, the Board explained to the Seventh Circuit Court of Appeal that a party wishing to engage in economic warfare had first to meet the requirements of Section 8(d)(3) of the Act by giving thirty days notice to the Mediation Service. As the Board explained to the Court, regardless of which party opened negotiations,

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[1]In *Mar-Len Cabinets, Inc.*, 243 NLRB 523 (1979) enforcement denied in part, 659 F.2d 995 (9th Cir. 1981), decision affirmed, 262 NLRB 1398 (1982), it was held that Section 8(d) of the Act forbids unilateral changes as well as strikes and lockouts.

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it could "perceive no intent on the part of Congress to permit a waiver of the requirements of Section 8(d)(3) . . . ." On the contrary, the Board stated, the intention of Section 8(d) of the Act was to " . . . promote the stability of labor relations by establishing a definite period in which mediation is given an opportunity to facilitate the peaceful resolution of collective bargaining disputes . . . ." *Hooker Chemical & Plastics Corp.*, 224 NLRB 1535, enforcement denied, 573 F.2d 965 (7th Cir. 1978).

Similarly, a union is found to be in violation of Section 8(d)(3) of the Act where it strikes the employer without prior notice to the Mediation Services, even though the "initiator" of the contract re-opening was the employer. *Carpenters District Council of Denver*, 172 NLRB 793 (1968). See also, *Communication Workers of America*, 186 NLRB 625 (1970); *United Marine Division, Local 333*, 228 NLRB 1107 (1977). In such cases, the Board will find a union guilty of an unfair labor practice, even though the violation is "merely technical," despite the fact that such a finding will have the devastating impact on employees of causing them to lose their jobs. *Retail Store Employees, Local 322*, 240 NLRB 1109, 1111 (1979); *Fort Smith Chair Co.*, 143 NLRB 514 (1963), enforced, 336 F.2d 738 (D.C. Cir. 1964).

The Board's revision of the requirements of Section 8(d) of the Act is inconsistent with the statutory scheme. The Board would hold that the language of the statute compels the conclusion that the requirements of Sections 8(d)(1) through 8(d)(4) are entirely the responsibility of the so-called "initiating party." First, it should be noted that the statute does not employ that concept. Rather, the statute addresses the requirements of the "party desiring . . . termination or modification." In the present case, while it was the Petitioner-Union that was the "initiator" of negotiations, clearly, the employer, United Artists, was the party desiring termination or modification. Second, by its very terms, Section 8(d)(4) of the Act imposes a mutual obligation on both parties to maintain the

status quo during the notification period. Indeed, it would be impossible for one party to do so unilaterally. As the language of Section 8(d)(4) of the statute makes clear, the congressional drafters understood the sixty day period reference therein to include a thirty day period after which the Mediation Services have had notice of the dispute. Thus, the legislative understanding was that the status quo would have to be maintained by both the parties until thrity days after notice to the Mediation Services. See, *Hooker Chemicals & Plastics Corp. v. NLRB*, 573 F.2d 965, 970 (7th Cir. 1978) (Fairchild, J. dissenting).

Third, the Court's current reading of the statute is 180 degrees counter to the way the Board and the courts have heretofore read the statute. Recognizing that " . . . the whole thrust of the Section is to give the Service sufficient time to intervene in an effective manner . . .", the District of Columbia Court of Appeals held in *Local 219, Retail Clerks' Association v. NLRB*, 265 F.2d 814, 818 (1959), that the union violated the Act by striking without waiting thrity days after giving the notice required under Section 8(d)(3) of the Act. The Court, in so doing, recognized that the cooling off requirement of Section 8(d)(4) must include thirty days in which the Mediation Services may work, regardless of the literal wording of that Section, and that the obligation imposed by Section 8(d)(4) of the Act to maintain the *status quo* is independent of and separate from the obligation to give notice as an "initiating party" under Section 8(d)(1) of the Act. Similarly, in *Fort Smith Chair Co.*, 143 NLRB 514 (1963), enforced, 336 F.2d 738 (D.C. Cir. 1964), the Board held that while Section 8(d)(4) of the Act appears to merely require a sixty day cooling off period, Section 8(d)(3) of the Act imposes an additional thirty day period after notice to the Mediation Services, on the grounds that the statute must be construed in such a way as to foster collective bargaining instead of economic warfare. The Circuit Court of Appeals affirmed, holding that the purpose of this statute is "to give full scope to the use of the Mediation Services. . . ." *Ibid.*, 336 F.2d 738. This is completely at odds

with the Board's current position, finding that the sole obligation of the non-initiating party is to maintain the *status quo* in effect for sixty days after the opening notice of Section 8(d)(1) is given.

The Board's construction of the statute is in conflict with applicable decisions of this Court. The primary policy of the National Labor Relations Act and specifically Section 8(d) is to protect the public from the disruptions of industrial strife. See, Congressional Record, Senate, May 12, 1947, reprinted at 2 Legislative History of Labor-Management Relations Act, 1496 (1948). As this Court has recognized, Section 8(d)(4) of the Act " . . . is susceptible of various interpretations. . . . Its ambiguity was recognized by the Joint Committee of Congress created by the very Act of which Section 8(d) was a part, to study the operation of federal labor laws. . . ." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 288 (1957). Accordingly, the Court, citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, ruled out a " . . . narrowly literal construction of the words of the statute. . . ." *Ibid.*, at 288. There, the Court held that Section 8(d)(4) of the Act must be read in light of the two overriding statutory purposes of the Taft-Hartley Amendments: " . . . to substitute collective bargaining for economic warfare and to protect the rights of employees to engage in concerted activities for their own benefit." *Ibid.*, at 289. The Court went on to warn that a "construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it." *Ibid.*, at 298. It is clear that the Board, with the approval of the Ninth Circuit Court of Appeals, has ignored the guidelines set forth by this Court regarding the legislative intent of Section 8(d) of the Act — to substitute collective bargaining for economic warfare. The Board, in its revisionary statutory intepretation, reasons that it is sufficient to place the burden of notification upon the party "initiating" collective bargaining. In so doing, the Board disregards the public interest in having the Mediation Services attempt to get the parties to substitute collective bargaining for economic warfare. Instead, the Board now would require notice to the Mediation Services only when

the so-called initiating party desires to engage in a strike, lockout, or unilateral change. The Board's error here is clear: It has focused narrowly on the allocation of tactical burdens and advantages in the collective bargaining relationship, and not the public interest in seeing that the Mediation Services are deployed in hopes of averting labor strife.

This construction of the statute runs counter to federal labor policy, since it encourages rather than discourages the use of economic weaponry by the parties to a collective bargaining relationship. Previously, any party considering whether to undertake a strike, lockout, or unilateral changes (which, as in the present case, may provoke a strike) had to allow for at least thirty days, during which the Federal and/or state Mediation Services would be allowed to attempt to conciliate the dispute. Now, under the Board's extremely broad holding, either party may engage in economic warfare, with its attendant cost to the public, without permitting the opportunity for that beneficent influence. By the simple expedient of avoiding the status of initiating or opening party under Section 8(d)(1), unions will be permitted, and in fact induced, to strike without prior notice to the Mediation Services. Those services will not have adequate time in which to attempt to head off incipient labor disputes. Similarly, employers will be tempted to avoid being initiators, so as to permit them to hold their ultimate economic weapon, the lockout, open for use without prior notice.[2] As the Board articulately pointed out to the Seventh Circuit, this realloca-

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[2]Under the prior clear-cut rule that both parties had to forebear from economic warfare for at least thirty days after the notification to the Mediation Services, *Peoria Painting & Decorating Contractors*, 204 NLRB 345 (1975), the Board reports show no litigated cases on the issue. That the parties will engage in tactical jockeying to avoid "initiator" status under the rule of *United Artists Communications, In.*, 274 NLRB No. 17 (1985), is suggested and exemplified by the recent decision in *Weathercraft Co. of Topeka, Inc.*, 276 NLRB No. 52 (1985).

tion of obligations will give the non-initiating party an extraordinary tactical advantage in the form of a "first strike capability" which will allow one party to engage in economic warfare unannounced while the other party is not permitted to do so, and while the public suffers the consequences. See, *Hooker Chemicals & Plastics Corp. v. NLRB, supra*, at 970.

Under the law as the Board has now rewritten it, the party who is a non-"initiator" reserves its right to engage in unilateral economic warfare without notification to the Mediation Services — a result certainly not contemplated by the legislative authors. Where negotiations are opened informally, as they often are, without written notice, either party may now lockout or strike without invoking mediation. Similarly, in a situation where one party, for tactical considerations or otherwise, delays giving formal or written notice of re-opening, it thereby preserves its right to engage in such conduct, both unannounced and without waiting the thirty day period set forth in Section 8(d)(3). In industries where unions anticipate being asked to engage in concessionary bargaining, the union is encouraged to play cat-and-mouse with the process. The initial notification required by Section 8(d)(1) of the Act will not be given by the Union. If the collective bargaining agreement has an automatic renewal clause, the union will thereby succeed in freezing the *status quo* for an additional year. Regardless of whether the contract has such a clause, either party may profit from its status as a non-initiator to the detriment of the public. The non-initiator may use the strike or lockout weapon without a thirty day wait, and without prior notification to the opposite party. Thus, the present Board holding promotes the very evil which the statute sought to prevent: "quickie" strikes without an opportunity for the emollient intervention of the state and Federal Mediation services.[3]

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[3]In this regard it should be noted that the Board's logic herein requires it to explicitly overrule the line of cases holding that a union's striking

CONCLUSION

For the reasons suggested above, the Petition for Writ of Certiorari should be granted.

Dated:

Respectfully submitted,
VAN BOURG, WEINBERG, ROGER & ROSENFELD

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*Counsel of Record

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without prior notification to the Mediation Services is unlawful, even where the union was the non-initiating party. See, *Carpenters District Council of Denver*, 172 NLRB 793 (1968); *Communication Workers of America*, 186 NLRB 625 (1968); *United Marine Division, Local 333*, 228 NLRB 1107 (1977), and to further rule that persons who lost their employee status as a result of such strikes were improperly terminated.

APPENDIX A

D E C I D E D

DEC. 30, 1985

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNIONS NO. 215, 297, 504, 521, 577, 709 and 762, and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNION NO. 294,	No. 85-7140
Petitioners,	
v.	
NATIONAL LABOR RELATIONS BOARD,	NLRB No. 274 NLRB 17
	OPINION

Respondent,)
)
and)
)
UNITED ARTISTS COMMUNI-)
CATIONS, INC.,)
)
Intervenor.)
)

On Petition for Review of Decision and Order of the National Labor Relations Board

Argued and Submitted
November 6, 1985

Before HUG and HALL, Circuit Judges, and JAMESON*, District Judge.

JAMESON, District Judge:

The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada (IATSE), District 2 and its constituent local unions (the Unions) have petitioned this court to

* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

to review a decision of the National Labor Relations Board construing Title I of the Labor-Management Relations Act (LRMA), 29 U.S.C. §§151-188. The Board held that the burden of notifying the mediation services[1] of a dispute under Section 8(d)(3) and (4) of the LMRA, 29 U.S.C. §158(d)(3) and (4), rested on the party initiating the bargaining process (the Unions)[2], and that the failure to file such notice did not preclude the non-initiating party (United Artists Communications, Inc.) from undertaking

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1 As set forth later herein, Section 8(d)(3) of the LMRA, 29 U.S.C. §158(d)(3) provides for a 30 day notice to the Federal Mediation and Conciliation Service and to State or Territorial mediation agencies.

2 The Southern California locals and the Phoenix local filed separate charges, and initially separate complaints issued. Thereafter, the Board ordered consolidation of the cases, and a consolidated amended complaint issued.

otherwise lawful economic action. We affirm the decision of the Board and deny the petition for review.

I. Background

IATSE and its constituent local unions represent United Artists Communication's projectionists in southern California and Phoenix, Arizona. Collective bargaining agreements covering the projectionists expired on January 31, 1982. Despite a long history of successful negotiations, the Unions and United Artists were unable to reach a further collective bargaining agreement, causing the southern California locals on November 1, 1982 and the Phoenix local on March 7, 1983 to file charges against United Artists with the Board. The Unions charged that United Artists committed an unfair labor practice,

violating §8(a)(1) and (5) of the LMRA, by implementing unilateral changes, absent the requisite notice to the mediation services required by Section 8(d)(3).

The Unions initiating the bargaining process.[3] In compliance with Sec-

3 The local unions urge that they were not the initiating party because they did not wish to modify the collective bargaining agreement, but rather to continue it for one year. Nevertheless, the administrative law judge correctly found that since the local unions were first to notify United Artists that they wished to terminate or modify the collective bargaining agreement, they were the initiating parties. NLRB v. Mar-Len Cabinets, Inc., 659 F.2d 995 (9th Cir. 1981); Hooker Chemicals and Plastics Corp v. NLRB, 573 F.2d 965 (7th Cir. 1978); United Furniture Workers, Local 270 v. NLRB, 336 F.2d 738 (D.C. Cir.), cert. denied, 379 U.S. 838 (1964). The designation of initiating party does not sway from the union to employer depending upon the bent of negotiations, but remains fixed on the party who initially provided notification of its desire to terminate or modify the collective bargaining agreement. Mar-Len, 659 F.2d at 998.

tion 8(d)(1) of the LMRA, the southern California locals notified United Artists by letter, dated December 1, 1981, of their deisre to negotiate a new collective bargaining agreement; similarly, the Phoenix Local notified United Artists by telegram on May 7, 1981. The Unions sought to extend the terms of the collective bargaining agreement then in force for one year. United Artists sought to modify the terms of the agreement to permit more efficient use of new technological advances in projection equipment. Old equipment required the constant attention of the projectionist during the film's showing, while new equipment allows one projectionist to move from theatre to theatre performing maintenance work and setting up films as needed. The new equipment significantly

reduces the number of projectionists needed.

The Unions and United Artists conducted a series of sixteen negotiating sessions beginning January 21, 1982, and ending in the fall of that year. United Artists presented its final offer to the southern California locals on September 9 and to the Phoenix local on November 8, and unilaterally implemented its offers on October 11 and December 6, respectively. Strikes followed implementation of the changes.

During the bargaining process neither the Unions nor United Artists notified the mediation service within thirty days of the sixty day notice of Section 8(d)(1) to United Artists, as required by Section 8(d)(3) of the LMRA. However, despite the lack of formal

notice, the Federal Mediation and Conciliation Service knew of the disputes and participated in the negotiations on November 8, 1982, and January 20, 1983. United Artists eventually provided formal notice to the mediation services on January 23, 1983, after it had already implemented unilateral changes.

II. Findings of the Administrative Law Judge and the Board

The administrative law judge found that United Artists violated Section 8(d)(3) of the LMRA, by implementing its final offer before the mediation services had been notified. The Board reversed, finding that Section 8(d)(3) imposed no burden on United Artists to notify the mediation services where the Unions, as initiating parties, had failed to do so, and finding that unilateral change by

by United Artists as the non-initiating party was consistent with the LMRA since the sixty day period of Section 8(d)(1) and (4) had expired. In reversing, the Board abandoned its earlier position that Section 8(d)(3) prohibits both parties to a collective bargaining agreement from imposing unilateral changes or using economic weapons, such as strike or lock-out, until thirty days after the mediation services have been notified, and adopted the position taken by the Seventh Circuit in denying enforcement in two previous Board decisions. See, Hooker Chemicals & Plastics v. NLRB, 224 NLRB 1535 (1976), enf. denied, 573 F.2d 965 (7th Cir. 1978); Peoria Chapter of Painting and Decorating Contractors, 204 NLRB 345 (1973) enf. denied, 500 F.2d 54 (7th Cir. 1974).

III. Standard of Review

Congress has delegated the often difficult and sensitive taks of determining national labor policy to the National Labor Relations Board, subject to limited judicial review. Beth Israel Hospital v. NLRB, 437 U.S. 483, 501 (1978). If the Board's construction of the statute is "reasonably defensible", it should not be rejected merely because the courts might prefer another view of the statute. Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1978); Hospital & Service Employees Union, Local 399 v NLRB, 743 F.2d 1417, 1425 (9th Cir. 1984).

Nor is the Board "disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue

de novo...." NLRB v. Local 103, Iron Workers, 434 U.S. 335, 351 (1978). Rather, the task of the reviewing court is to decide whether "the Board has reached a fair and reasoned balance upon a question within its special competence," and whether in "its newly arrived at construction" the Board "has adequately explicated the basis of its interpretation." NLRB v. Weingarten, Inc., 420 U.S. 251, 267 (1975).

IV. Is the Board's Interpretation "Reasonably Defensible?"

To determine the reasonableness of the Board's interpretation we look to the statute and corresponding legislative history of the LMRA.

A. Statutory Language

Section 8(d) provides in relevant part:

[W]here there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification --

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof....;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions or the existing contract for a period of sixty days after such

notice is given or until the expiration date of such contract, whichever occurs later. (Emphasis added).

The statute places the four enumerated duties on the initiating party - "the party desiring such termination or modification." Although somewhat ambiguous because of the prefactory phase that "no party to such contract shall terminate or modify such contract," the statute places no such enumerated duties explicitly on the non-initiating party.

The Unions, citing the Board's prior decisions in Hooker Chemicals and Peoria Painting, contend that to facilitate recourse to the mediation services, an integral part of the bargaining scheme, the Section 8(d)(3) notice must be given to the mediation

services prior to unilateral change by either party. The Board, however, overruled these prior decisions, reasoning:

> [I]t is evident from a fair reading of Section 8(d) that the notice burdens of that provision fall exclusively, in the words of the statute, on "the party desiring such termination or modification." Although the participation of the mediation services is clearly an important and principal policy interest embodied in Section 8(d), we will not interpret the statute in a manner mandating a rigid and absolute 30-day mediation requirement when the initiating party possessing the notice burden has made no effort to satisfy its notice obligations and thereby has foreclosed the non-initiating party's right to resort to economic weapons or, as here, to implement new terms and conditions of employment.

In reaching this conclusion, the Board adopted the reasoning of the Seventh Circuit in Hooker Chemicals, supra, and Peoria Painting, supra. The Board's decision continues:

> We agree fully with the Seventh Circuit's observation that the wording of Section 8(d) and its legislative history indicate that the method Congress chose to serve the purpose of facilitating the involvement of the mediation services "was to assign to one party, the initiating party, a fixed and definite responsibility for notifying the mediation services." Hooker Chemicals Corp. v. NLRB, above, 573 F.2d at 970.

B. Legislative History

The Unions contend that the legislative history of Section 8(d) "compels the conclusion, that Congress intended the 'cooling off period' to mandate maintenance of the statue quo by both parties irrespective of which party gave notice of contract opening." In support of this contention the Unions rely on a Senate report and the statement of Senator Taft. The use of the term "notice" throughout the legislative history without clarification as

to whether it is the sixty day notice period of Section 8(d)(3) and (4), or the thirty day notice period of Section 8(d)(3) makes the legislative history ambiguous. What can be surmised from the legislative history, however, supports the Board's current interpretation of the LMRA.

The Senate Report, cited by the Unions, states in relevant part:

> Under this section, parties to collective agreements in the future would be required to give 60 days' [sic] notice in advance of the terminal date, if they desire to terminate or amend. Should the parties fail to agree on a new contract in the next 30 days, the party taking the lead in refusing the old contract has the duty to notify the new Federal Mediation Service of the impasse. Should the notice not be given on time, irrespective of the presence or absence of a 60-day clause in the collective agreement, it becomes an unfair labor practice for an employer to change any of the terms or conditions specified in the contract for

> 60 days or to lock out his employees. Similarly, it is an unfair labor practice by a union to strike before the expiration of the 60-day period.

S. Rep. No. 105, 80th Cong., 1st Sess. (1947) (Emphasis added), reprinted in, 1 Legislative History of the National Labor Management Relations Act, 1947, 407, 430 (1959).

The Unions argue that "notice" in the emphasized sentence refers to the thirty day notice to mediation services mentioned in the previous sentence, and that the report therefore supports their position that untimely filing of the notice to mediation services extends the time in which the terms of the contract must be followed. Given the other references to the sixty day period in the emphasized sentence and the following sentence, the Board's

present construction of "notice" in the emphasized sentence as referring to the sixty day period provided in Section 8 (d)(4) is more persuasive. Section 8(d)(4) refers only to the "period of sixty days" during which the parties to the agreement cannot resort to strike or lockout. The Report makes no reference to an independent thirty day period following an untimely mediation notice.

Senator Taft's statement,[4] like-

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4 Senator Taft states in relevant part:

> We have provided in the revision of the collective bargaining procedure, in connection with the mediation process, that before the end of any contract, whether it contains such a provision or not, either party who wishes to open the contract may give sixty days notice in order to afford time for free collective bargaining, and then for the intervention of the Mediation Service. If such notice is given, the bill provides for no waiting period except during the life of the contract itself. If, however, either party

wise, may properly be interpreted as referring to the sixty day notice period and not to the thirty day notice to the mediation services. The Seventh Circuit, in Hooker Chemicals, 573 F.2d at 968, finding Senator Taft's statement "inconclusive" concluded:

> Nothing in the statement suggests that if the initiating party gives

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4 (con't) neglects to give such notice and waits, let us say, until 30 days before the end of the contract to give notice, then there is a waiting period provided during which the strike is an unlawful labor practice for sixty days from that time, or to the end of the contact and thirty days beyond that time. In that case there is a so-called waiting period during which a strike is illegal, but it is only brought about by the failure of the union itself to give the notice which the bill requires shall be given. So it seems to me to be no real limitation of the rights of labor unions. 93 Cong. Rec. 3955 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act, 1947, 1015 (1948).

> late notice to the mediation services, the non-initiating party is precluded from exercising its right to strike or lock out until the mediation services have had 30 days to intervene, even if this exceeds the contract expiration date.

The Unions also rely on a report of the Watchdog Committee, S. Rep. 986, 80th Cong., 2d Sess. 15 (1948), established by Congress to monitor Section 8 (d) and other amendments to the LMRA. The relevant portions of this report are set out in Hooker Chemicals, 573 F.2d at 968. We agree with the Seventh Circuit that:

> The only clear indication of legislative intent that can be discerned from this report is that the burden of notifying the mediation services is on the initiating party, a concept clearly expressed by the language of the statute.

Id.

C. Policy Consideration

The Board, in explaining the

reversal of its prior decisions in Peoria Painting and Hooker Chemicals, said in part:

> As found by the Seventh Circuit in denying enforcement to Hooker Chemicals [sic], the concept of shifting the burden of filing the 8(d)(3) notice of dispute to the non-initiating party in order to establish a uniform 30-day mediation requirement is a matter of policy that simply is not reflected in the statutory language of Section 8(d).

In further defense of its construction of the statute, the Seventh Circuit in Hooker Chemicals, 573 F.2d at 970, said:

> The restraint imposed on the initiating party may be viewed as an incentive to fulfill its statutory duty to give timely notice; the initiating party need only perform its statutory duty to avoid the restraint. Accordingly, we preceive no injustice in permitting the non-initiating party to use economic weapons after contract expiration even though the initiating party may be restrained from such actions as a result of its own default.

We agree with the Seventh Circuit. The Board's current interpretation provides the needed incentive to insure notification of the mediation services, since the initiating party will not wish to be left without resort to economic weapons.

V. Conclusion

We conclude that (1) the Board's current interpretation of the statute is "reasonably defensible"; and (2) in reversing its prior interpretation the Board "has reached a fair and reasonable balance" and has adequately explained the basis of its current interpretation. Accordingly, we affirm the decision of the Board and deny the petition for review.

AFFIRMED.

APPENDIX B

JD--SF--260--83

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

UNITED ARTISTS COMMUNICATIONS, INC.,	Case No. 21-CA-21653

and

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNIONS NO. 215, 297, 504, 521, 577, 709 and 762	
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNION NO. 294	Case No. 21-CA-22248 (formerly Case 28-CA-7358

ERRATA

The Administrative Law Judge's Decision that issued in this matter on November 28, 198. is hereby corrected as follows:

Page 7, line 3 "October" is substituted for November;

Page 16, line 36 "Respondent" is substituted for "The Charging Party."

RICHARD D. TAPLITZ
Administrative Law Judge

Dated: December 1, 1983

JD--(SF)--260--83
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

UNITED ARTISTS COMMUNICATIONS, INC.	)	Case 21-CA-21653
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INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNIONS NO. 215, 297, 504, 521, 477, 709 AND 762	)	
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS AND ITS CONSTITUENT LOCAL UNION NO.	)	Case 21-CA-22248 (formerly Case 28-CA-7358

Paul H. Fisch, Atty., of Los Angeles, CA, for the General Counsel.
Severson, Werson, Berke & Melchior, by J. Mark Montobbio, Atty., of San Francisco, CA, for the Company.
Van Bourg, Allen, Weinberg & Roger, by Paul Supton, Atty., of San Francisco, CA, for the Charging Parties

DECISION

Statement of the Case

RICHARD D. TAPLITZ, Administrative Law Judge: This case was tried in Los Angeles, California on August 10 and 11, 1983. The charge, first and second amended charge in Case 21-CA-21653 were filed respectively on October 8, 22 and November 1, 1982 by International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, Southern Association of IATSE District No. 2 Locals, AFL-CIO, and its

Constitutent Local Unions No. 215, 297, 504, 521, 577, 709 and 762 (herein District 2; the locals are referred to as the Southern California Locals). A complaint issued in that case on January 31, 1983. The charge in Case 21-CA-22248 (formerly 28-CA-7358) was filed on March 7, 1983 by International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, Southern Association of IATSE District No. 2 Locals, AFL-CIO, and its constituent Local Union No. 294 (Local Union No. 294 is referred to as Local 294 or the Phoenix Local; all of the above labor organizations are jointly referred to as the Unions). A complaint issued on that charge on April 18, 1983. An order consolidating cases and a consoli-

dated amended complaint issued on June 23, 1983. The consolidated amended complaint alleges that United Artists Communications, Inc. (herein called Respondent or the Company) violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended.[1]

Issues

The primary issues are:

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1 When issued, the consolidated amended complaint contained allegations relating to Case 21-CA-22254 (formerly 32-CA-4921). At the outset of the trial, the General Counsel and Respondent entered into an informal settlement agreement resolving all aspects of that case. After considering the objections of the Charging Party, I severed Case 21-CA-22254 from the other cases in the consolidated complaint and approved the settlement agreement. Those paragraphs of the consolidated complaint that related to Case 21-CA-22254 were stricken from that complaint. In his brief counsel for the Charging Party requests that the approval of the settlement agreement be rescinded. That request is denied.

1. Whether Respondent had a duty pursuant to Section 8(d)(3) of the Act to notify state and federal mediation services before making unilateral changes at the expiration of a collective-bargaining agreement under circumstances where the Unions initiated the request for negotiations.

2. If Respondent breached such a duty, what would the appropriate remedy be?

3. Whether a strike called by the Unions upon implementation of the unilateral changes by Respondent constituted an unfair labor practice strike.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been

carefully considered, were filed on behalf of the General Counsel, Respondent and the Charging Party.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a Maryland corporation with its principal office at 172 Golden Gate Avenue, San Francisco, California, is engaged in the business of motion picture entertainment in California and Arizona where it operates various theaters. During the year immediately preceding issuance of the complaint, Respondent derived gross revenues in excess of $500,000 from both its California and Arizona

operations and, during the same period, it purchased and received at its California and Arizona facilities, goods valued in excess of $50,000 directly from suppliers located outside of California and Arizona. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Agreed Upon Facts

An examination of the pleadings and stipulations in the record reveals that the parties are in agreement with regard to the number of the underlying facts.

District 2 and the Southern Califor-

nia Locals are the exclusive collective bargaining representatives of Respondent's movie projectionists in its theaters in Southern California (the Southern California unit).[2]

District 2 and Local 294 are the exclusive collective bargaining repre-

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2 The full description of the unit is:

All full-time and regular part-time employees of operating or projection rooms and operators of apparatus in connections appertaining thereto employed by Respondent at its theaters identified as follows: Westminster Mall, Westminster Twin, UA Cinemas in Costa Mesa, UA Cinemas, the City of Orange, UA Movies, Brea Shopping Center (Local 504), Cerritos Mall, Cerritos Twin, UA Marketplace Movies, Long Beach (Local 521), UA Cinemas, Tyler Mall, UA Riverside Movies, UA Movies, Montclair (Local 577), Glass House Movies, San Diego, UA Cinemas, El Cajon (Local 297), Santa Maria, UA Cinemas (Local 762), UA Movies, Bakersfield (Local 215), and UA Movies, Thousand Oaks (Local 709); excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

sentatives for Respondent's projectionists in the Phoenix and Scottsdale, Arizona area (the Phoenix unit).[3] For many years Respondent has had a collective-bargaining agreement with District 2 and the Southern California Locals as well as with District 2 and the Phoenix Local. The latest contract in both units expired on January 31, 1982.

From early 1982 to September 9, 1982 Respondent, District 2 and the Southern California Locals engaged in negotiations for a new contract in the Southern California unit. On September 9 Respondent presented its final offer to

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3 A full description of that unit is:
All moving picture projectionists employed by Respondent at its Phoenix and Scottsdale, Arizona facilities; excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

District 2 and the Southern California Locals and notified those unions that the terms and conditions of the offer would be implemented on October 11, 1982. By letter dated October 6, 1982 Respondent notified District 2 of the new schedule that would be put into effect on October 11. The schedule does not indicate how many employees would be needed with relation to the job needs before the change.

From early 1982 to November 8, 1982 Respondent, District 2 and the Phoenix Local met to negotiate a new contract in the Phoenix unit. On November 8, 1982 Respondent presented its final offer to those unions and notified them that the terms and conditions of the offer would be implemented on December 6, 1982.

On October 11, 1982 Respondent

unilaterally implemented the terms of its final offer in the Southern California unit and on December 6, 1982 it unilaterally implemented its final offer in the Phoenix unit. In neither case did it give notice to the Federal Mediation and Conciliation Service nor the appropriate state conciliation service before putting the changes into effect. The implementation of the final offers resulted in a reduction in the number of available unit jobs and the reduction of the number of employees in both bargaining units.

On October 11, 1982 Respondent's employees in the Southern California unit went out on strike and on December 6, 1982 the employees in the Phoenix unit also struck.

None of the unions have ever filed

a notice to the state of federal mediation services with regard to the incidents described in the complaint.

B. Findings Based on the Evidence

1. Background - changes in technology

Traditionally a projectionist has been on duty in the projection room whenever a movie was being shown.[4] Until about 10 or 13 years ago there was no question that the duties of the projectionist required his constant presence. The projector made use of carbon arc lamps that contained no fail-safe systems and had to be supervised. The film came in 20-minute reels and there was no automatic way for changing from one reel to another. In addition the projectionist had to

4 More than one screen could be used from one projection room.

maintain the equipment, thread the film and rewind it at the end, splice broken film, keep the proper focus, maintain the sound level and in general, attend to the operation of the equipment. About 10 or 13 years ago all of Respondent's theaters were equipped with more modern systems. Zenon lamps replaced the carbon arcs. The new lights could be replaced routinely before the end of their life expectancy and they did not need the same type of care as the carbon arcs. A new "platter" system was used whereby the projectionist could join together the 20-minute reels of film so that the entire picture could be shown without any changing of reels. From Respondent's point of view projectionists were often sitting in the projection

room with nothing to do throughout the entire showing of the picture. From the union's point of view the projectionists were still needed for the maintenance of the equipment, the sound levels, the adjustment of focus, the splicing of broken film and other necessary matters.

In late 1981 Respondent negotiated with various IATSE unions in Northern California. They arrived at an agreement under which there were major changes in the duties of the projectionists. Under the new contract the projectionists travel from one theater to another. At each theater the projectionists would thread the projector, do preventive maintenance and other work, and then move on to a new theater where he would repeat those tasks. During the

showing of the film there would often be no projectionist in the booth. If the film broke and had to be spliced or adjustments to sound or focus were needed, it would be done by a management official. The result was that many fewer projectionists were needed. The dispute involved in this case arose when Respondent adopted this new procedure in Southern California and Phoenix.

2. The negotiations for a new contract and notification of the mediation services

The most recent collective-bargaining agreement in the Southern California and Phoenix bargaining units expired on January 31, 1982. That contract contained a provision that a projectionist had to be in the booth whenever a movie was shown.

In both the Phoenix and the Southern

California bargaining units, the unions were the initiating parties in opening negotiations for a new contract. By letter dated December 1, 1981 Walter Blanchard, the vice chairman and secretary-treasurer of District 2, on behalf of the Southern California Locals, advised James Gallagher, general manager of Respondent, of the unions' wish to meet for the purpose of negotiating the terms of a new agreement to take effect upon the termination of the then outstanding contract.[5]

For many years the Phoenix Local bargained as part of District 2. However it began negotiations for a new contract independently from District 2. On May

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5 The letter stated that District 2 was acting on behalf of the unions listed on its letterhead. That letterhead did not list the Phoenix Local.

7, 1981 Nugget Cornell, a business agent for the Phoenix Local, sent Respondent a telegram stating that the Phoenix Local would negotiate the contract on its own. The telegram requested Respondent to let the union know when they could meet. Cornell credibly testified that he re-opened the contract for negotiations through a telephone call he made to Gallagher, the general manager of Respondent. Respondent and the Phoenix Local held their first meeting shortly after the contract expired on January 31, 1982.

During the summer of 1982 Respondent andthe Phoenix Local held three negotiating sessions in Scottsdale, Arizona in which the Phoenix Local negotiated independently of District 2. At a meeting with District 2 and the Southern

California Locals in September 1982 Blanchard, the vice chairman and secretary-treasurer of District 2, informed Respondent that the Phoenix Local would from that point on be represented by District 2. Subsequent negotiations were held jointly.

The first negotiating session between Respondent and District 2 was held on January 21, 1982. Respondent took the position that it considered the existing practices in the projection room to be featherbedding and it proposed an arrangement similar to the one that had been negotiated in Northern California in which the projectionists would go from theater to theater. Respondent took the same position with the Phoenix Local. District 2 proposed a 1-year extension of the existing contract.

Respondent and District 2 held 16 negotiating sessions during which all aspects of a proposed contract were discussed. Agreement was reached with regard to some proposals but not with regard to others. The parties discussed and could not agree on such matters as changes in the wage structure and a "buy out" proposal by the Unions that would compensate employees who would no longer have jobs if the company's proposals were accepted.

By letter dated September 21, 1982 Respondent, through its attorney J. Mark Montobbio, sent District 2 a copy of Respondent's final offer that had been presented to District 2 at a negotiating session on September 9, 1982 and requested the union to submit the offer to its membership for a ratification

vote. The letter stated that the offer constituted Respondent's best and final offer and that if it was not accepted Respondent would implement its proposal, in the Southern California unit effective Ocotober 11, 1982.

On October 8, 1982 a high level meeting was held between Respondent's president Robert Naify and IATSE's international vice president Steve D'Inzillo. No agreement was reached. On November 11, Respondent unilaterally implemented the terms of its final offer in the Southern California unit. Under that newly implemented proposal, there was no work available for a substantial number of Respondent's employees.

By letter dated November 22, 1982 Respondent, through its district manager Lee Josselyn, notified Nugget Cornell,

the business agent of the Phoenix Local, that on December 6, 1982 Respondent would implement its proposal to the Phoenix Local. The new plan was implemented on December 6, 1982 and, as with the Southern California unit, there was a substantial reduction in the number of projectionists who are needed to do the available work.

There is extensive testimony in the record concerning what was said and done at the various negotiating sessions. That testimony would have been necessary if there were a contention in this proceeding that Respondent had engaged in surface bargaining, had sought to undermine the bargaining agent, had unilaterally made changes in the absence of impasse, or lacked good faith in trying to reach an agreement. However none of

those matters are at issue. The only wrongdoing alleged in the complaint or litigated at the trial related to Respondent's implementation of changes in conditions of employment at the expiration of the collective-bargaining agreement without giving notice to federal and state mediation services pursuant to Section 8(d) of the Act. It is undisputed that Respondent failed to give any notice to the state and federal mediation services before making those changes. Respondent did give formal written notice to the mediation services, but that was well after the changes were put into effect. On January 26, 1983 Respondent's attorney Montobbio notified the Federal Mediation and Conciliation Service, the Arizona Industrial Commission, Labor Department, and the Califor-

nia State Mediation and Conciliation Service of the dispute on the form prescribed by the Federal Mediation and Conciliation Service.

Though none of the unions gave the state or federal mediation services a formal written notice of the dispute and Respondent only notified those services after the changes were put into effect, the Federal Mediation Service was aware of the dispute and actually took part in the negotiations before the changes in the Phoneix unit were put into effect. Walter Blanchard, the vice chairman and secretary-treasurer of District 2, credibly testified that it was his understanding that IATSE International vice president and District 2 rerpesentative Steven D'Inzillo requested the federal mediation service to

conduct a meeting. The Federal mediator must have received notice of the dispute on or before November 1, 1982 because on November 1 Respondent's general manager Levin sent a letter to D'Inzillo and to Blanchard of District 2 confirming a conversation of that date in which a meeting was requested for November 8, 1982 between Respondent and the District 2 Locals after a meeting with the Federal mediator at 10 a.m. regarding the Phoenix Local. On November 8, 1982 Respondent met with the Federal mediator, District 2 and the Phoenix Local. On January 20, 1983 another meeting was held between the Federal mediator, District 2 and the Phoenix Local. No agreement was reached in any of those meetings.

3. The strike

On October 10, 1982, the day before

Respondent implemented the changes in the Southern California unit, 15 delegates to District 2 held a meeting at which they authorized a strike in the Southern California unit. Walter Blanchard is vice chairman and secretary-treasurer of District 2. He testified that at the meeting the delegates discussed their belief that Respondent was locking them out without the benefit of proper notification to the mediation and conciliation service. He averred that they also discussed their belief that Respondent was not bargaining in good faith. According to Blanchard the strike was authorized because of those things. I am unable to credit Blanchard with regard to his assertion that the lack of notice was discussed at the meeting or was con-

sidered in connection with the reason for the strike vote. His testimony in that regard was equivocal and his demeanor did not inspire confidence in his veracity. He testified that he was sure that he must have spoken about the notice and then testified that he could not recall specifically doing so. When asked who spoke about the notice, he replied that he believed that a number of people did. He was unable to identify any individual. Though the union voted to strike, there is no indication that anyone considered whether the union had to file notice before striking. District 2 filed a charge and two amended charges involving the Southern California unit. Though the charge alleged in general terms that there was a refusal to bargain within the 6

months immediately preceding the filing of a charge, there was no specific mention of a failure to file notice. In a 23-page affidavit that Blanchard gave to the Board on October 28, 1982 there is a detailed explanation of why the union felt that Respondent refused to bargain in good faith. In the affidavit Blanchard states that the union did not give notice to federal or state mediation services. However there is no mention of a meeting of delegates prior to the strike at which the reasons for a strike were discussed. There is no indication in the affidavit that the strike was motivated in any part by Respondent's failure to give notice to the mediation services, or that he was even aware that Respondent had any obligation in that regard. In sum, I believe that the

"notice" issue was not considered by District 2 in determining to strike and that issue was inserted as an afterthought well after the strike began. I find that District 2 and the Southern California Locals decided to strike in the Southern California unit because Respondent was about to change the working conditions as described above.

On October 11, 1982 about 10 projectionists in the Southern California unit reported for work. They were told by Respondent that they would be permitted to work only under the changed conditions of employment. They refused to go to work under those conditions.[6]

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6 The record is not clear with regard to how many jobs were available under the changed conditions. Blanchard testified that before the change about 50 employees were needed and after the change only about 8 would be required. However he further testified that he was

As of the date of the trial, none of the projectionists who worked in the Southern California unit reported back to the job to work under the changed conditions. Also as of the date of the trial, Respondent had not hired any replacements for those projectionists. Apparently the work is being done by management personnel.

A similar scenario unfolded in the Phoenix bargaining unit. On December 5, 1982 there was a membership meeting of the Phoenix Local at which the members rejected Respondent's proposed contract. The employees voted to strike because they were not satisfied with the terms of the proposed contract.[7] When

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6 not sure. I do not believe that Blanchard was a reliable witness and I do not rely on his guess with regard to the amount of work available.

7 These findings are based on the cred-

projectionist in the Phoenix unit went to work on December 6 they were asked by Respondent's representatives whether they would work under the terms that Respondent had proposed and they replied that they wanted to go to work under the terms of the old contract. Respondent's representatives said they could only work under the new terms. At that point the employees began to picket. As of the date of the trial, none of the projectionists who had worked under the expired agreement in the Phoenix unit reported to work under the new conditions. Also as of the date of the trial, Respondent hired no replacements for those projectionists.[8]

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7 ited testimony of Nugget Cornell, the business agent of the Phoenix Local.

8 Larry Levin, Respondent's general manager, testified that jobs are still available for projectionists if they

C. Analysis and Conclusions

1. The refusal to bargain

If an arbitrator were empowered by the parties to resolve the dispute in an interest arbitration by setting new contract terms, he or she might well evaluate the historical rights and duties of the parties, the evolution of technological change, the ability of the various parties to absorb the impact of such change and all the equities involved. I have no such luxury. The complaint was narrowly drawn and the only issues in this case are those framed by the complaint and the answer. The gravamen of the General Counsel's case is that Respondent made unilateral changes after the expiration of the collective-bar-

8 want to work under the changed conditions.

gaining agreement without giving notice to the mediation services as required in Section 8(d)(3) of the Act. There is no allegation related to surface bargaining, to changes in the absence of impasse, or to any aspect of the bargaining obligation other than that connected to the notice requirement. There is no allegation that Respondent violated Section 8(a)(3) or that there were any discharges or constructive discharges that violated the Act. As the case turns on the notice requirements of the Act, the starting point must be the wording of the Act itself. The relevant parts of Section 8(d) read:

> ....where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate of modify

such contract, unless the party desir-

ing such termination or modification--

> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof....;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later....

The 60-day waiting period specified in

Section 8(d)(4) has been deemed to include the 30-day waiting period set forth in Section 8(d)(3). The result is that the waiting period, before effectuating a change, must include a full 30-day period after notification to the mediation services. As the Board held in Fort Smith Chair Company, 143 NLRB 514, 519 (1963), enf. 336 F.2d 738 (D.C. Cir. 1964), cert, den. 379 U.S. 838 (1964):

> ....it has also been concluded that, where late notices under Section 8 (d)(3) to the Mediation and Conciliation Service are filed, the waiting period must be extended to include a full 30 days after the filing of such notices in order to give mediation its intended statutory period in which to work.

Section 8(d) has been interpreted so as to limit contract changes in the absence of proper notice even where no strike or lockout is involved. NLRB v. Mar-Len

Cabinets, Inc., 659 F.2d 995, 997 (9th Cir. 1981).

Section 8(d) provides that the party desiring to terminate or modify the contract shall follow the procedures prescribed in Section 8(d)(1) through (4). Though an argument could be made that both parties to the contract may desire modification of the contract and therefore both have the duty to file the notices, the Board and the Courts have narrowly defined the statutory terms. It is only the party who makes the first move to reopen the contract who is considered to be the "party desiring such termination or modification." That is the "initiating party" and the obligations of that initiating party do not switch to the other party no matter what happens in the course of negotiations.

As the Board held in Fort Smith Chair Company, supra at p. 516-17:[9]

9 See also United Furniture Workers of America v. NLRB, 336 F.2d 738, 741 (D.C. Cir. 1964), cert. den. 379 U.S. 838 (1964), where that Court held:

> ...the Board read Section 8(d), correctly we think, as expressly putting the responsibility for giving the required notices, under Section 8(d)(3) as well as under Section 8(d)(1), upon the party to the contract who raises the possibility of industrial conflict by moving to open up the existing contractual arrangements. Once the contract is thown out on the table for re-bargaining at the instance of one party, counter-proposals are normally forthcoming; and the course of bargaining frequently tends to become a dim and tangled thicket in which it is easier to sense the lurking threat of industral strife than to see from what quarter it comes. Because this is the likely course of events once an initiative is taken to change a contract, and because Congress believed that it was imperative in the public interest for disinterested and expert third parties to have an opportunity to bring the parties together, the burden of giving the notices was, not unreasonably, placed on the party who voluntarily elects to put these events in train....

> The Trial Examiner has found, in effect, that while Section 8(d) imposes its requirements upon the party desiring to terminate or modify the contract, the duty of complying with these requirements may at times shift from the party who initially invokes that section to the other party. We preceive no basis in this section, or in the legislative history, for viewing the responsibility under this section so tentatively. To make this section's continued applicability to the party initially desiring the change turn on the unpredictable course which the ensuing bargaining may take is to bring the disquiet of a potential lockout or a strike into an area where Congress wanted quiet--indeed, a "cooling off" period. We therefore conclude contrary to the Trial Examiner that, by serving notice of its desire to terminate the existing contract and to negotiate a new agreement the Union took upon itself the responsibility for complying with the remaining requirements of Section 8(d) before engaging in a strike and that its failure to file the notices required by Section 8(d)(3) caused the strike to be unlawful from its inception.

In the instant case it is clear that the Unions were the initiating parties. It was the union in both bargaining

units that opened negotiations. Respondent contends that it had no duties under Section 8(d)(1) through (4) of the Act because those duties are required only of the initiating party.[10] If Respondent did not have any duty under Section 8(d)(1) through (4), it could not breach such a duty. Such a position finds some support in earlier Board cases. Royal Packing Co., 198 NLRB 1060, 1068 (1972), enf. __F.2d__ (D.C. Cir. 1979), 86 LRRM 2571; Fibreboard Paper Products Corp., 130 NLRB 1558,

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10 The preamble to Section 8(d)(1)-(4) states that no party shall make a modification unless the party desiring "such" modification gives the required notices. It thus appears that no party can make the modifications desired by the initiating party unless the notices are given. Here Respondent did not make the modifications desired by the Unions (who were the initiating parties). The wording of Section 8(d) does appear to place all the obligations of 8(d)(1)-(4) solely on the initiating party.

1573 (1961), reconsidered and reversed on other grounds, 138 NLRB 550 (1962), enf. 322 F.2d 411 (D.C. Cir. 1963), affirmed 379 U.S. 203 (1964). However the Board took a different tack in Peoria Painting & Decorating Contractors, 204 NLRB 345 (1973), enf. den. 500 F.2d 54 (7th Cir. 1974). In that case the union, who was the initiating party, did not file timely notice to the mediation services. The company locked out its employees the day after the contract expired. That was more than 60 days after the union's service of an 8(d)(1) notice but less than 30 days after the union served an 8(d)(3) notice. The administrative law judge held that the company was not privileged to resort to a lockout without regard to the requirements of Section 8(d) merely because of

a default on the part of the union to meet those requirements. The Board adopted the administrative law judge's findings and conclusions without any comment. The Seventh Circuit Court of Appeals had a great deal of comment. In refusing to enforce the Board Order that Court held:

> ...The Administrative Law Judge concluded as a matter of law that the Association violated Section 8 (d)(4). Since the command of Section 8(d)(4) was directed only to the initiating party and since the Union, not the Association, initiated this dispute, the Association cannot be held liable for violating Section 8(d)(4), on which the findings of unfair labor practices violative of Section 8(a)(5) and (1) were predicated.
>
> * * *
>
> Furthermore, there is nothing in the legislative history of the Act which suggests either that the extent of the "cooling off" period is variable, depending on when the initiating party chooses to notify the mediators or that the mediation provision is

> operative independently of the entire Section 8(d) scheme. On the contrary, the legislative history suggests that notice to the mediation services within thirty days after notice is given to the other party implies the corresponding obligation by the non-initiating party to bargain in good faith during the remaining portion of the sixty day period. Thus, once the noninitiating party has observed its duty to bargain collectively during the sixty-day period subsequent to receiving notice, it has fulfilled its duty under Section 8(d), whether or not the initiating party has met its obligation under Section 8(d)(3) to notify state and federal mediators. (Footnotes omitted.)

In Hooker Chemicals & Plastics Corp., 224 NLRB 1535 (1976), enf. den. 573 F.2d 965 (7th Cir. 1978), the Board had an opportunity to reconsider its Peoria decision in the light of the Seventh Circuit's refusal to enforce it. The facts were very similar to those in Peoria. The union was the initiating party; it gave notice required by Section 8(d)(1); it did not give timely

notice to the mediation services. The Board decided to follow its Peoria decision and found that the company violated the Act, holding (at page 1538):

> ...It is undisputed that the non-initiating party, here the Respondent, does not have any obligation under Section 8(d)(3) to file such a notice. But since the obligation of Section 8(d)(4) falls equally on both parties, the noninitiating party, in order to comply with its duty to maintain the status quo during the statutory period of mediation, may find it necessary to file such a notice or compel the other party to do so, if it intends to resort to economic actions without violating the Act. Although this appears to shift the burden of filing the notice of dispute, it operates to facilitate the mediation period which is the crux of Section 8(d)(4) of the Act.

The Seventh Circuit in denying enforcement of the Board Order held (pages 967-8):

> The Board's position was that the employer violated 8(d)(4) by locking out its employees before the media-

> tion services had 30 days to intervene, even though the burden to notify the mediation services was clearly on the union. We refuse to enforce this construction of 8(d) because it requires contorting the statute's plain language without any clear indication of legislative intent suggesting such a perversion. We are of the opinion that the employer fulfilled its statutory duties under 8(d) by bargaining in good faith until the contract expired.

It has long been Board policy to require administrative law judges to follow Board rather than Circuit Court law, where there is a conflict between the two, until such time as the Supreme Court has ruled. Regency at Rodeway Inn, 255 NLRB 961, fn. 2 (1981); Iowa Beef Packers, Inc., 144 NLRB 615 (1963), enf. den. in part, 331 F.2d 176 (8th Cir. 1964). In the instant case Respondent, the noninitiating party, modified the contract after the expiration of that contract under circumstances where the

mediation services did not have the full 30 days notice of the existence of a dispute. Unless some other defense is successfully raised, a finding is required under the Board's Peoria and Hooker cases, supra, that Respondent has refused to bargain in violation of Sections 8(d) and 8(a)(5) of the Act. Respondent has not advanced any additional defenses that would preclude such a finding. It is true that union officer Blanchard "understood" that another union agent requested the Federal Mediation Service to conduct a meeting. Such meetings were held on November 8, 1982 and January 20, 1983. However even if an informal oral notice is sufficient to meet the requirements of Section 8(d)[11] and even if the notice of one

11 See United Mine Workers of America,

party can be relied on by the other party,[12] there was no notice to the State Mediation Services. Such notice to the State Mediation Service is mandated to the same degree as notice to the Federal Mediation Service. See Retail Store Employees Local 322 (Wilhow Corporation), 240 NLRB 1109 (1979).

2. The status of the strikers

As found above in Section B.3, the Unions decided to strike because Respondent was about to change the working conditions and then struck when the changes were implemented. District 2 and the Southern California Locals struck in the Southern California unit on October 11 and the Phoenix Local

11 Local 1854 (Amex Coal Co.), 238 NLRB 1583, 1609, fn. 43 (1978), enf. den. in part, 614 F.2d 872 (3rd Cir. 1980).
12 NLRB v. Mar-Len Cabinets, Inc., 659 F.2d 995, 998 (9th Cir. 1981).

struck in the Phoenix unit on December 6, 1982. Both strikes were intended to put pressure on Respondent to accept terms and conditions of employment that were desired by the Unions rather than those which Respondent had put into effect. Under ordinary circumstances the strikes would have been economic in nature. However in the instant case the changes in conditions of employment that Respondent put into effect, though not improper in themselves, were unlawful because proper notification had not been given to state and federal mediation before the changes were made. The Unions did not strike because of Respondent's failure to give that notice. They struke because they were dissatisfied with the changes. The question is whether the failure to give notice so

tainted the changes that the strike should be considered to be an unfair labor practice strike.

As the Board held in Tufts Brothers, Inc., 235 NLRB 808, 810 (1978):[13]

> An unfair labor practice strike is one which is caused in whole or in part by an unfair labor practice. The requirement of a causal connection between the unfair labor practice and the strike is not satisfied merely because the two coincide in time. It is necessary for the Board to find that Respondent's unlawful conduct in fact constituted a contributing cause to the strike that followed. (Footnote omitted.)

In the instant case Respondent engaged in an unfair labor practice by modifying the contract without proper notice having been given to the mediation services. The unions struck because of those modifications. Whether or not the unions even knew of any

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13 See also Whisper Soft Mills, Inc., 267 NLRB No. 133 (1983)

notice requirements, the modifications were unlawful because of the context in which they were given. Neither the failure to give notice standing alone nor the modifications in the contract standing alone were unlawful. It was the combination that violated the Act and I do not believe that the two parts can be separated in assessing the motivation for the strikes. I therefore find that the strikes were unfair labor practice strikes and that the strikers were unfair labor practice strikers.

Conclusions of law

1. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing and giving effect to collective bargaining proposals covering terms and conditions of employment of its employees in the Southern California and

the Phoenix bargaining units at a time when the notice provisions of Section 8 (d)(3) and (4) of the Act had not been fully complied with.

2. Respondent's employees in the Southern California and the Phoenix bargaining units who struck in protest against the changes made by Respondent engaged in unfair labor practice strikes and were unfair labor practice strikers.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

The Charging Party, the General Counsel and the Respondent are in sharp disagreement with regard to the nature

of the remedy.

The Charging Party takes the position that Respondent's late filed notice to the mediation service was of no effect because it was given in the context of an outstanding unremedied unfair labor practice, that a status quo ante remedy is required, that all employees should be reinstated with full backpay, and that no change in the terms and conditions of employment should be allowed until after the violation is fully remedied and a new proper notice to the mediation service is given. In its brief, the Charging Party argues at length for the propriety of such a remedy. However such a remedy would require a substantial change in existing Board law. It would not be appropriate under the cases cited below.

The General Counsel contends that Respondent's employees in the Southern California and the Phoenix Local should be entitled to backpay for a limited time. Under the General Counsel's view of the case the backpay should begin as of the date Respondent made the unilateral change in each unit and end 30 days after Respondent gave notice of the dispute to the mediation services. The change in the Southern California unit was on October 11, 1982 and the change in the Phoenix unit was on December 6, 1982. Respondent gave notice to the Federal and State Mediation Services on January 26, 1983. The General Counsel also contends that the employees should be given the reinstatement rights due to unfair labor practice strikers. Those two positions taken by the General

Counsel appear to be inconsistent. In the absence of a discharge or constructive discharge, strikers are not entitled to backpay until they offer to return and are refused.[14] That applies even to unfair labor practice strikers. There is no allegation in the complaint, or finding in this Decision that the employees were discharged, constructively discharged or unlawfully denied reinstatement. As of the date of the trial none of the strikers had offered to return to work.

The General Counsel places primary reliance for its position with regard to

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14 As the Board held in Abilities and Goodwill, 241 NLRB 27, 28 (1979), enf. den. on other grounds, 612 F.2d 6 (1st Cir. 1979):

> ...striking employees--who have not been unlawfully discharged--are not entitled to backpay while engaged in a strike unless and until they abandon the strike and request reinstatement.

remedy on Mar-Len Cabinets, Inc., 243 NLRB 523 (1979), enf. den. in part and remanded on other grounds, 659 F.2d 995 (9th Cir. 1981), original decision affirmed 262 NLRB 1398 (1982). In that case the Board found that a company violated Section 8(a)(5) of the Act in two separate units, an inside and an outside unit. With regard to the inside unit the Board held that the company violated the Act by refusing to bargain in good faith and by unilaterally withdrawing recognition from a union. There was no Section 8(d) notice issue in that part of the case. With regard to the outside unit the Board found that the company, who was the initiating party, violated the Act by unilaterally implementing its bargaining proposals without providing the mediation services with

timely notice of the dispute. In that case the union refused to bargain in the outside unit because it took the position that an association-wide contract covered that unit. The company filed notices with the mediation services after it made its unilateral changes. The Board ordered the company to make the outside employees whole for loss of wages and benefits incurred as a result of the company's unilateral implementation of its bargaining proposals from the time those proposals were implemented until 30 days after the notice to the mediation services was given. That is the relief sought by the General Counsel in the instant case.

The Charging Party contends that it has not violated the Act but goes on to argue that if a violation is found, it

would be cured by the posting of a notice and that a backpay award would constitute a penalty rather than a remedy. In support of that position the company cites Fox Midwest Theatres, Inc., 158 NLRB 1096, 1099-1100 (1966). That case was similar in many ways to the instant one. There the company made unilateral changes without giving the proper 8(d) notices and those changes reduced the amount of available work. The Board adopted the administrative law judge's decision which held:

> The only substantial problem posed by the record is the contention of the General Counsel that the remedial order to be entered herein require Respondent to reinstate Winburn and Bowman to their former positions and to make them whole for any loss of pay suffered since October 6, together with interest thereon at 6 percent per annum. I find no merit to this contention.
>
> The General Counsel makes no claim,

indeed the record contains no evidence, that Respondent's conduct in terminating either the contract or the employment of Winburn and Bowman was motivated by union animus. Nor is there any claim or evidence, except for the failure to give the required notice to the Federal and State authorities, that Respondent did not negotiate in good faith for a new contract. On the contrary, Winburn's own testimony requires a finding that Respondent endeavored in good faith to reach agreement with the Union. Having failed to reach accord, and being confronted with the Union's demand that the 49-hour guarantee be continued, Respondent was within its rights in terminating the employment of these two men.

"The power (of the Board) to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act....Here, there is no basis for a finding that the (terminations of the two men) were a consequence of the unfair labor practices found by (me, or that these terminations) in themselves thwart any policy of the Act, or that (the reinstatement and award of backpay) would in any way make the order

to cease any more effective." (Emphasis supplied). Consolidated Edison Co. of New York, Inc. v. NLRB, 305 U.S. 197, 236.

Here, reinstatement of Winburn and Bowman, and an award of backpay, would bear no relationship to the violations found, nor would it remedy or tend to remedy the unfair labor practices found. "The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights." Republic Steel Corporation v. NLRB, 311 U.S. 7, 10. To award backpay to Winburn and Bowman because Respondent failed to give the statutory notice would be no less than the imposition of a fine or penalty.

It is mere speculation to assume that the negotiations between the parties would have been more fruitful if the Federal or State authorities had been notified. In any event, the parties stipulated that the Union itself gave notice to these authorities on October 8, 1964, and Winburn testified that the parties had further negotiation meetings on October 27, and November 4 and 27. It was also undisputed that Respondent on December 7 and again on December 22, repeated its offer to have Winburn and Bowman "return to work to do whatever work may be available without a guarantee

> of a certain amount of work per week." Notwithstanding this continuing stalemate through December, the record fails to disclose that either the Federal or State authorities intervened notwithstanding the Union's notice to such authorities given on October 8. Respondent's failure to give earlier notice must therefore, under the circumstances existing here, be deemed to be no more than a technical violation of the Act which caused no loss or harm to the Union or its members. To grant the General Counsel the relief requested by him would constitute the imposition of a fine or penalty for that technical violation. This I decline to do.

The reasoning in that case is persuasive. Backpay, to be a remedy, must be geared to putting employees back in the position they would have been in but for the unfair labor practice. Though ambiguities may be construed against the wrongdoer, there must be some basis to reasonably infer that the employees would have received the amount of backpay but for the unfair labor practice. As in

the Fox Midwest Theaters decision I do not believe that such a reasonable inference is warranted under the facts of this case. There is no allegation of overall bad faith bargaining and apparently the parties had reached an impasse. Basic problems relating to technological changes were involved and the parties met and bargained over the impact of those changes on many occasions. The Federal Mediation Service was in fact involved in those negotiations more than 30 days before the changes on the Phoenix unit were put into effect. The Federal Mediation Service was involved in the negotiations in the Southern California unit after the changes had been put into effect but was unable to make any contribution to the resolution of the problem. The record does not give a clear indica-

tion of how much work was available after the changes. The Union never tested that matter because as soon as the changes were made, a strike occurred and as of the date of the trial, no replacements had been hired. In the absence of unlawful discharge or constructive discharge strikers are not entitled to backpay until after their offer to return to work has been refused.

There are other cases where backpay has been awarded to remedy a violation based on a failure to give Section 8(d) notices, but in each of them there are significant factual matters that distinguish them from the instant situation.[15] The central question is whether

15 See, for example, Hooker Chemicals & Plastics Corp., supra, and Peoria Painting & Decorating Contractors, supra, in which there were unlawful lockouts; Pacific Grinding Wheel Co., 220 NLRB

the remedy provisions of Fox Midwest Theatres, supra, was overruled by the Mar-Len decisions, supra. It is noted that in the original Mar-Len decision, 43 NLRB 523, 534, the Board adopted the decision of the administrative law judge which cited Fox Midwest Theatres, for the proposition that 8(d)(3) notices were required. There is no other reference to Fox Midwest Theatres in that case. I believe that Mar-Len is sufficiently different on its facts from Fox Midwest Theatres that there is no basis for saying that Mar-Len overruled Fox, sub silentio. There was no bargaining,

1389 (1975) enf. 572 F.2d 1343 (9th Cir. 1978), and Bagel Bakers Council, 174 NLRB 622 (1969), enf. in part __F.2d__ (2nd Cir. 1970), 75 LRRM 2718, in which there was overall bad faith bargaining; and Huttig Sash & Door Co., 154 NLRB 811 (1955) enf. 377 F.2d 964 (8th Cir. 1967), in which there was a mid-term modification.

much less bargaining to impasse, in the outside unit in Mar-Len. Also in Mar-Len there was overall bad faith bargaining in the inside unit that may well have colored the remedy with regard to the outside unit. In sum I believe that under the narrow factual circumstances present in Fox Midwest Theatres and in the instant case the Fox Midwest Theatres decision is still controlling law. I shall therefore not recommend the back-pay award requested by the General Counsel.

As the strikers in the Southern California and Phoenix bargaining units have been found to be unfair labor practice strikers, I recommend that they be given reinstatement rights as is set out in Whisper Soft Mills, Inc., 267 NLRB No. 133 (1983). It is recommended that

Respondent be ordered to reinstate those employees upon their unconditional request, to their former jobs, or if such positions no longer exist, to substantially equivalent positions,[16] without prejudice to their seniority or other rights or privileges previously enjoyed, discharging, if necessary, any replacements, and that it make whole such employees for any loss of earnings resulting from its failure to reinstate them within 5 days of their unconditional request, with interest thereon to be computed in accordance with Florida Steel Corporation, 231 NLRB 651 (1977).[17]

16 Nothing herein is to be construed as to require Respondent to reinstate the job duties of the projectionists that existed prior to modifications that Respondent made on October 11 and December 6, 1982.

17 See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

If Respondent has already rejected, or hereafter rejects, unduly delays, or ignores any unconditional offer to return to work or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.[18] Such employees for whom no employment is immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for such owrk. Priority for placement on such list is to be determined by seniority or some other nondiscriminatory test.[19]

Upon the basis of the foregoing

18 See Newport News Shipbuilding and Dry Dock Company, 236 NLRB 1637 (1978), enf. 602 F.2d 73 (4th Cir. 1979).
19 James W. Whitfield, d/b/a Cutten Supermarket, 220 NLRB 507 (1975).

findings of fact, conclusions of law and the entire record, I issue the following recommended:[20]

ORDER

The Respondent, United Artists Communications, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

a. Refusing to bargain collectively with the IATSE Unions named in this decision, or with any other union, by unilaterally implementing and giving effect to collective bargaining proposals covering the terms and conditions

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20 In the event no exceptions are filed as provided in Section 102.46 or the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

of employment of its employees in its Southern California or Phoenix bargaining unit, at a time when the notice provisions of Section 8(d)(3) and (4) of the Act have not been fully complied with and when such union is the exclusive collective bargaining representative of its employees.

b. In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act:

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Reinstate, upon unconditional request, all strikers in its Southern California and Phoenix bargaining units to their former jobs or, if such posi-

tions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements; and make such employees whole for any loss of earnings resulting from its failure to reinstate them within 5 days of their unconditional request in the manner set forth in the section of this Decision entitled "The Remedy." Such employees for whom no employment is available shall be placed on a preferential hiring list based upon seniority, or some other nondiscriminatory test, for employment as jobs become available.

b. Post at each of its facilities within the Southern California and Phoenix bargaining units copies of the attached notice marked "Appendix."[21]

Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

c. Notify the Regional Director in writing within 20 days from the date of

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21 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

this Order what steps it has taken to comply.

Dated: November 28, 1983

RICHARD D. TAPLITZ
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with IATSE Unions or any other union, by unilaterally implementing and giving effect to collective bargaining proposals covering terms and conditions of employment of our employees in the Southern California or Phoenix bargaining unit at a time when the notice provisions of Section 8(d)(3) and (4) of the Act have not been fully complied with and when such union is the exclusive collective bargaining representative of our employees.

WE WILL NOT, in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL reinstate, upon unconditional request, all strikers in our Southern California and Phoenix bargaining units to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements, and make such employees whole for any loss of earnings resulting from our failure to reinstate them within 5 days of their unconditional request, with interest. WE WILL place employees for whom no employment is available on a preferential hiring list based upon seniority or some other nondiscriminatory test, for employment as jobs become available.

UNITED ARTISTS COMMUNICATIONS, INC.
(Employer)

Dated_____

By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 606 South Olive St., 24th Floor, Los Angeles, CA 90014, Telephone (213)688-5229

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED ARTISTS COMMUNICATIONS, INC. Case 21-CA-21653

and

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNIONS NO. 215, 297, 504, 521, 577, 709 and 762

and

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNION NO. 294

Cases 21-CA-22248 (Formerly Case 28-CA-7358)

DECISION AND ORDER

On 28 November 1983 Administrative Law Judge Richard D. Taplitz issued the attached decision. The General Counsel,

the Charging Party, and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

This proceeding raises issues under Section 8(d) of the Act regarding the obligation of a party receiving notice of the proposed termination or modification of a collective-bargaining agreement to notify mediation services before imple-

1 The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judg'es credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

menting changes in terms and conditions of employment. Relying on Peoria Painting Contractors, 204 NLRB 345 (1973), enf. denied 500 F.2d 54 (7th Cir. 1974), and Hooker Chemicals Corp., 224 NLRB 1535 (1976), enf. denied 573 F.2d 965 (7th Cir. 1978), the judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing new conditions of employment without first resorting to a 30-day mediation period by Federal and state mediation services under Section 8(d)(3) and (4). For the reasons set forth below, we are persuaded by the reasoning of the United States Court of Appeals for the Seventh Circuit in denying enforcement in Peoria Painting and Hooker Chemicals, and we shall overrule the Board's decisions in those cases and dismiss the consolidated complaint in this proceeding.

The essential facts are as follows.

For many years the Respondent and District 2 Stage Employees IATSE and its constituent, southern California locals have been parties to a series of collective-bargaining agreements covering projectionists employed by the Respondent. The Respondent has also been a party to a series of collective-bargaining agreements with District 2 and IATSE Local 294 in Phoenix, Arizona, covering projectionists in Phoenix and Scottsdale, Arizona. On 1 December 1981 District 2 on behalf of the southern California locals advised the Respondent by letter of its desire to meet for the purpose of negotiating a new bargaining agreement to take effect at the termination of the existing contract on 31 January 1982. District 2's reopener followed Local 294's notice of 7 May 1981 advising the Respondent of its desire to negotiate on its own a new agreement also terminating on 31 January 1982.

Pursuant to these notices by District 2 and Local 294, the parties commenced negotiations in January 1982. As set forth in detail in the judge's decision, the parties bargained for several months thereafter, but failed to reach agreement.[2] The principal issue and stumbling block in the negotiations concerned the proposed alteration of certain existing work duties and practices in the projection room. After continued negotiations proved unsuccessful, the Respondent notified District 2 on 21 September 1982 that the Respondent would implement its most recent and final offer effective 11 October 1982 in the southern California unit. On 10 October 1982 District 2 authorized a strike because of the Respondent's announced changes in working

2 In September 1982 District 2 notified the Respondent that Local 294 and the Arizona unit would henceforth be represented in negotiations by District 2. The parties thereafter negotiated on a joint basis for both units.

conditions. On 11 October 1982 the Respondent implemented its final proposal, and the projectionists in the southern California unit refused to work under the Respondent's newly established work rules. Thereafter, on 6 December 1982, the Respondent implemented its final proposal in the Arizona bargaining unit, and the employees in the unit refused to work under these new working conditions. Neither the Respondent nor District 2 or Local 294 formally notified Federal or state mediation services of the existence of a dispute before the implementation of the new terms and conditions of employment. On 26 January 1983 the Respondent formally notified the mediation services of the existence of a dispute.

The General Counsel and the Charging Party contend that once the Respondent received written notice of the proposed

modification of the existing bargaining agreements under Section 8(d)(1) the Respondent was required under Section 8 (d)(3) and (4) to continue in full force and effect all the contractual terms and conditions of employment of the projectionists in both the southern California and Arizona bargaining units for a 30-day period following formal notification to the mediation services of the existence of a dispute. Because the mediation services were not formally notified of the existence of a dispute before the Respondent's implementation of the changes in employees' terms and conditions of employment, the consolidated complaint alleged, and the judge so found, that the Respondent thereby violated Section 8(a)(5) and (1). The General Counsel does not contend that the Respondent otherwise failed to bargain in good faith during contract negotiations or that the Respon-

dent implemented the change before reaching a good-faith impasse in bargaining.

Section 8(d) of the Act provides in pertinent part as follows:

> Provided. That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification---
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Services within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been

reached by that time; and
(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.
... (Emphasis added.)

In Hooker Chemicals, above at 1538, The Board interpreted the foregoing provision as follows:

> (B)efore any action is taken to undermine the continuity and stability of the collective-bargaining relationship, the parties must allow mediation efforts to take place for 30 days. In other words, when a notice of dispute is untimely filed, the 60-day period referred to in Section 8(d)(4) is tolled so that mediation efforts may take place for the 30-day period envisioned by Section 8(d)(3) of the Act.

As in the instant proceeding, the employer in Hooker Chemicals occupied the status of a noninitiating party under Section 8(d)(1), i.e., the union and not the employer had tendered a written notice under Section 8(d)(1) of a proposed termination or modification of a collec-

tive-bargaining agreement. Although conceding that the employer as the non-initiating party had no statutory obligation under Section 8(d)(3) to file a notice of dispute with the mediation services, the Hooker Chemicals Board found that in order to facilitate recourse to the mediation services the noninitiating party "may find it necessary to file such a notice or compel the other party to do so, if it intends to resort to economic actions without violating the Act."[3] Based on this interpretation of Section 8(d) and notwithstanding numerous bargaining sessions and the passage of well over 1 year from the date of the

3 We recognize that unlike the lockout undertaken by the employer in Hooker Chemicals, the Respondent herein did not resort to a lockout, but instead implemented changes in existing terms and conditions of employment. It is well established, however, that in appropriate circumstances the notice provisions of Sec. 8(d) apply even when no strike or lockout is involved. Mar-Len Cabinets, 243 NLRB 523, 53' (1979), enfd. in part 659 F.2d 995, 998 (9th Cir. 1981).

8(d)(1) notice of termination in the Arizona bargaining unit and approximately 10 months from the date of the 8(d)(1) notice in the southern California unit, the judge found that the Respondent was not privileged to implement its final proposal even though it was the noninitiating party.

As found by the Seventh Circuit in denying enforcement to Hooker Chemicals, the concept of shifting the burden of filing the 8(d)(3) notice of dispute to the noninitiating party in order to establish a uniform 30-day mediation requirement is a matter of policy that simply is not reflected in the statutory language of Section 8(d). Thus, it is evident from a fair reading of Section 8(d) that the notice burdens of that provision fall exclusively, in the words of the statute, on "the party desiring such termination or modification." Although

the participation of the mediation services is clearly an important and principal policy interest embodied in Section 8(d), we will not interpret the statute in a manner mandating a rigid and absolute 30-day mediation requirement when the initiating party possessing the notice burden has made no effort to satisfy its notice obligations and thereby has foreclosed the noninitiating party's right to resort to economic weapons or, as here, to implement new terms and conditions of employment. We agree fully with the Seventh Circuit's observation that the wording of Section 8(d) and its legislative history indicate that the method Congress chose to serve the purpose of facilitating the involvement of the mediation services " was to assign to one party, the initiating party, a fixed and definite responsibility for notifying the mediation services."

Hooker Chemicals Corp. v. NLRB, above, 573 F.2d at 970. See also Amax Coal Co. v. NLRB, 614 F.2d 872, 889 (3d Cir. 1980). Because the Board's rationale in Peoria Painting and Hooker Chemicals effectively places the burden of notification on the noninitiating party, it is at odds with the language of the statute as written by Congress.[4] Accordingly, rather than continue to perpetuate the anomaly that a party having no obligation to file a notice of dispute must nonethe-

4 The judge cited Fort Smith Chair Co., 143 NLRB 514 (1963) enfd. 336 F.2d 738 (D.C. Cir. 1964), in support of the proposition that the 60-day period set forth in Sec. 8(d)(4) must include the 30-day period specified in Sec. 8(d)(3). In Fort Smith, the initiating party failed to tender the 8(d)(3) notices to the mediation services and its resulting strike was therefore unlawful from its inception. Accordingly, it is evident that Fort Smith involved the failure of the initiating party to tender the required notices and the consequent limitation of its right to take economic action in such circumstances. In contrast, the instant proceeding concerns the issue of limitations on the right of noninitiating party to take otherwise lawful economic action.

less do so if it desires to undertake lawful economic action, we overrule Peoria Painting and Hooker Chemcials. We now hold that the burden of notifying the mediation services of a dispute under Section 8(d)(3) and (4) rests exclusively with the initiating party and that the initiating party's faiiure to file such a notice cannot serve to preclude the noninitiating party from undertaking otherwise lawful economic action. We shall therefore dismiss the consolidated complaint in its entirety.[5]

5 In view of our dismissal of the consolidated complaint, we find it unnecessary to address the propriety of the judge's remedy or his discussion of various Board and court cases.

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

14 February 1985

Donald L. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

Section 8(d) of the Labor Management Relations Act, 29 U.S.C. §158 (d) is reproduced as follows:

(d) Obligation to bargain collectively

For the purposes of this section to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry

affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof; or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith

notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees

subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective

bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Concilation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and concilia-

tion , to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

No. 85-1594

Supreme Court, U.S.
FILED
APR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNIONS NO. 215, 297, 504, 521, 577, 709 AND 762, AND INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNION NO. 294,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD
and
UNITED ARTISTS COMMUNICATIONS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNITED ARTISTS COMMUNICATIONS, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), require a non-initiating party to give notice to the federal and state mediation services before engaging in otherwise lawful economic action, where the initiating party has defaulted on its obligation to give such notice?

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Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD
and
UNITED ARTISTS COMMUNICATIONS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNITED ARTISTS COMMUNICATIONS, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent United Artists Communications, Inc. (United Artists)[1] respectfully requests that this Court deny the Petition of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Southern Association of IATSE District No. 2 Locals, AFL-CIO, and its Constituent Local Unions, including Local Union No. 294, (Petitioners) for a Writ of Certiorari in this case seeking review of the Judgment of the United States Court of Appeals for the Ninth Circuit entered on December 30, 1985.

COUNTER STATEMENT OF THE CASE

The IATSE and its Constituent Local Unions historically represented United Artists' projectionists in Southern California and Phoenix, Arizona.[2] The last collective bargaining agreements covering the projectionists expired on January 31, 1982, and shortly before that expiration, the Unions initiated the bargaining process for a new agreement. Thus, in compliance with section 8(d)(1) of the National Labor Relations Act (Act), 29 U.S.C. § 158(d)(1), the Southern California Locals notified United Artists by letter, dated December 1, 1981, of their desire to negotiate a new collective bargaining agreement and similarly, the Phoenix Local notified United Artists by telegram on May 7, 1981. (Pet., App. A at 5-6 and note 3.) The Unions sought to extend the term of the collective bargaining agreement then in force for one year. United Artists sought to modify the terms of the agreement to permit more efficient use of new technological advances in projection equipment. Old equipment required the constant attention of the projectionists during the film showing, while new equipment allowed one projectionist to move from

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[1] Respondent United Artists Communications, Inc., is a Maryland corporation. It has no parent corporation and has one non-wholly owned subsidiary or affiliate, Magna Pictures.

[2] Following issuance of the National Labor Relations Board's February 1985 decision in this matter, the parties returned to bargaining and reached negotiated settlements under which United Artists' employment of all projectionists represented by District 2 and Local 294 ended on March 21, 1985 and June 1, 1985, respectively.

theatre to theatre performing maintenance work and setting up films as needed. The new equipment significantly reduced the number of projectionists needed.

The Unions and United Artists conducted a series of 16 negotiation sessions beginning January 21, 1982, and ending in the fall of that year without agreement. United Artists presented its final offer to the Southern California Locals on September 9 and to the Phoenix Local on November 8, and unilaterally implemented its offers on October 11 and December 6, respectively. Strikes followed the implementation of the changes.

During the bargaining process neither the Unions nor United Artists formally notified the mediation services within the 30 days of the 60-day notice of section 8(d)(1) as required by section 8(d)(3) of the Act, 29 U.S.C. § 158(d)(1) and (3). However, despite the lack of formal notice, the Federal Mediation and Conciliation Service knew of the disputes and participated without success in additional negotiations on November 8, 1982 and January 20, 1983. United Artists eventually provided formal notice to the mediation services on January 23, 1983, after it already implemented unilateral changes.

On November 1, 1982 and March 7, 1983, the Southern California Locals and the Phoenix Local respectively filed charges against United Artists with the National Labor Relations Board (Board). The Unions charged that United Artists committed an unfair labor practice by violating section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5), by implementing unilateral changes absent the requisite notice of the mediation services required by section 8(d)(3) and (4).

An Administrative Law Judge of the National Labor Relations Board found that United Artists violated section 8(d) of the Act by implementing its final offer before the mediation services had been notified. The Judge concluded that while the language of the Act did not appear to place any notification obligation on a "non-initiating" party such as United Artists, the Judge felt himself bound by the Board's previous decisions in *Peoria Chapter of Painting & Decorating Contractors of America,* 204 NLRB 345 (1973), enforcement denied, *N.L.R.B. v. Peoria Chapter of Paint-*

ing & Decorating Contractors of America, 500 F.2d 54 (7th Cir. 1974), and *Hooker Chemicals & Plastics Corp.*, 224 NLRB 1535 (1976), enforcement denied, *Hooker Chemicals & Plastics Corp. v. N.L.R.B.*, 573 F.2d 965 (7th Cir. 1978), where the Board had found that a non-initiating party was required to provide notice to the mediation services if the initiating party had defaulted on that obligation. The Judge felt bound by those Board decisions even though enforcement of the decisions had been denied by the Seventh Circuit Court of Appeals on review. (Pet., App. B at 37-44.)[3]

After the filing of exceptions to the Administrative Law Judge's decision, the Board reversed and found *no* violation of the Act by United Artists. In reconsidering the language of the Act, the Board found that section 8(d) imposed *no* burden on United Artists as a non-initiating party to notify the mediation services where the Union, as initiating party, had failed to do so. The Board therefore found that the unilateral changes made by United Artists as a non-initiating party was consistent with the Act since the 60-day period in section 8(d)(1) and (4) had expired. In reversing, the Board expressly abandoned its earlier position taken in *Peoria Painting* and *Hooker Chemicals*, and instead adopted the position taken by the Seventh Circuit in denying enforcement of the two previous Board decisions. (Pet., App. C at 8-14.)

On appeal by the Petitioners, the Ninth Circuit Court of Appeals affirmed the decision of the Board below. The Court concluded that the Board's current interpretation of the statute was "reasonably defensible" in that that interpretation was consistent with the language of the statute and the corresponding legislative history, and the Board's current interpretation provided the needed incentive to ensure notification to the mediation services. (Pet., App. A at 11-15, 20-22.)

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[3] Consistent with existing Board precedent in *Fox Midwest Theatres, Inc.*, 158 NLRB 1096 (1966), the Administrative Law Judge did not order any backpay remedy. The Judge found that such a remedy would be punitive under the circumstances of this case, where United Artists' implementation of its final offers came only after many months of good faith bargaining which resulted in a clear impasse between the parties.

REASONS FOR DENYING THE PETITION

Respondent United Artists submits that the Petition should be denied because the question presented by this case was *properly* decided in accordance with statutory language and the intent of Congress, is *not* the subject of conflicting opinions in the Courts of Appeals, is *not* in conflict with any opinion of this Court, and does *not* raise a significant issue in the administration of the National Labor Relations Act warranting the review of this Court.

1. The Decisions Of The Board and Court of Appeals Below Are Consistent With The Language Of The Statute

The finding by the Board and the Ninth Circuit below that section 8(d) *cannot* be read to place any notification requirement on the non-initiating party is in full accord with the language of the Act itself. Section 8(d)(1)-(4) establishes four notice and waiting period requirements.[4] The statute also clearly indicates *who* must meet the four requirements—namely, "the party seeking such termination or modification." There is absolutely no statutory basis for finding that any of the obligations of section 8(d)(1)-(4) are applicable to any party other than "the party desiring such modification or termination." If Congress had intended that *all* parties to negotiations be required to fulfill the 8(d) requirements, it could have said "all parties" rather than "*the* party desiring such modification or termination." Finally, the Board and the Courts have long agreed that "the party seeking such modification or termination" means *only* the party initially reopening the contract (the "initiating party") and that the burden does not shift depending upon the bent of negotiations. *Fort Smith Chair Company*, 143 NLRB 514 (1963), enforced *sub nom., United Furniture Workers, Local 270 v. N.L.R.B.*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964); *Hooker Chemicals & Plastics Corp. v. N.L.R.B.*, 573 F.2d 965 (7th Cir. 1978); *N.L.R.B. v. Mar-Len Cabinets, Inc.*, 659 F.2d 995 (9th Cir. 1981). As the Board and the Courts have uniformly held that

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[4] The relevant portions of section 8(d) are attached as an Appendix to this brief.

the non-initiating party does not become "the party seeking such modification or termination" simply because it later seeks termination of the contract, it *must* follow that the non-initiating party is *not* required to meet the obligations of section 8(d)(3) or (4) since again the 8(d) requirements apply *only* "to the party seeking such modification or termination."

The Petitioners in their Petition to this Court make *no* attempt to challenge the construction of the language of the Act rendered by the Board and Ninth Circuit below, except to suggest that "the party desiring such modification or termination" should not be synonymous with the initiating party. Instead, Petitioners urge this Court to adopt the uniformly rejected concept that the "desiring" party be determined by the position taken during the course of negotiations. The Petitioners, however, cite absolutely no statutory, legislative or judicial support for their half-hearted challenge to the long-standing and uniform interpretation of the Act applied by the Board and Court of Appeals in this case.

2. The Decisions of the Board and the Ninth Circuit Below are in Full Accord with the Decisions of the Other Court of Appeals to Address this Issue

Petitioner does not and *cannot* claim that the decision of the Board below as affirmed by the Ninth Circuit is in conflict with the opinion of any other Court of Appeals. On the contrary, those decisions are in *full* accord with the previous rulings of the Seventh Circuit Court of Appeals in *N.L.R.B. v. Peoria Chapter of Painting & Decorating Contractors of America*, 500 F.2d 54 (7th Cir. 1974), and *Hooker Chemicals & Plastics Corp. v. N.L.R.B.*, 573 F.2d 965 (7th Cir. 1978).

For years the Board held that under section 8(d) *only* the initiating party had any obligation to give notice to the mediation services and that a non-initiating party did not violate the Act by failing to give such notice prior to taking economic action. *See, Royal Packing Company*, 198 NLRB 1060 (1972). In *Peoria Painting & Decorating Contractors*, 204 NLRB 345 (1973), however, in a sudden and unexplained departure from this precedent, an administrative law judge of the Board, concluded without any examination of the actual language of the Act, that since

affording notice to the mediation services was an integral part of the statutory scheme, that a non-initiating party was not privileged to resort to economic action without giving its own notice to the mediation services if the initiating party defaulted in meeting that obligation. On review, the Seventh Circuit Court of Appeals forcefully rejected this quantum leap made by the administrative law judge in *Peoria Painting*. The Seventh Circuit in *N.L.R.B. v. Peoria Chapter of Painting & Decorating Contractors of America, supra*, concluded that the notification requirements of the Act could not be transferred to a non-initiating party simply through an initiating party's default. The Seventh Circuit concluded that while notification of the mediation services was an important statutory goal, Congress chose *one* party, the initiating party, upon which to place the burden of giving the required notice to the mediation services.

In *Hooker Chemicals & Plastics Corp.*, 224 NLRB 1535 (1976), a panel of the Board had an opportunity to review its earlier decision in *Peoria Painting* in light of the Seventh Circuit's denial of enforcement in that case. In *Hooker Chemicals*, the Board reaffirmed its prior ruling in *Peoria Painting* but inexplicably failed to address the Seventh Circuit's conclusion that the plain language of the statute could not support a violation of section 8(d) by a non-initiating party. Instead, the Board panel once again based its decision solely on the ground that alternative notification by a non-initiating party would further facilitate intervention by the mediation services. Once again, however, the Seventh Circuit Court of Appeals in *Hooker Chemicals & Plastics Corp. v. N.L.R.B., supra*, refused to enforce the Board's ruling. The Court of Appeals in *Hooker Chemicals* again concluded that the Board's ruling was an unnecessary "perversion" of the language of section 8(d) and the Court refused "to enforce this construction of 8(d) because it requires contorting the statute's plain language without any clear indication of legislative intent suggesting such a perversion." (573 F.2d at 968.) The Seventh Circuit again found that Congress' purpose in having the mediation services involved in dispute resolution in a timely manner was sufficiently met by Congress' decision to place the burden of notifying the mediation services on one party, the initiating party.

In the instant case, the Board below reconsidered its position and concluded this time, as had the Seventh Circuit twice before, that the obligations of section 8(d)(1)-(4) lie solely with the initiating party. In this regard, the Board declared:

> [I]t is evident from a fair reading of section 8(d) that the notice burdens of that provision fall exclusively, in the words of the statute, on the "party desiring such termination or modification." (Pet., App. C at 11.)

Therefore, recognizing its previous error, the Board properly overruled its earlier decisions in *Peoria Painting* and *Hooker Chemicals* and held:

> Because the Board's rationale in *Peoria Painting* and *Hooker Chemicals* effectively places the burden of notification on the non-initiating party, it is at odds with the language of the statutes written by Congress. . . . We now hold that the burden of notifying the mediation services of a dispute under section 8(d)(3) and (4) rest exclusively with the initiating party and that the initiating party's failure to file such notice cannot serve to preclude the non-initiating party from undertaking otherwise lawful economic action. (Citation omitted.) (Pet., App. C at 13-14.)

On review, the Ninth Circuit concluded that the Board's new interpretation adopting the Seventh Circuit's previous holdings was a "reasonably defensible" interpretation of the statute. The Ninth Circuit, after reviewing the language of section 8(d), also concluded that the Seventh Circuit and the Board's current holding were correct that "the statute places no such enumerated duties exclusively on the non-initiating party," and that "the Board's current interpretation provides the needed incentive to ensure notification to the mediation services . . . ." (Pet., App. A at 13, 22.)

Thus, completely contrary to the contention of Petitioners, the rulings of the Board and the Ninth Circuit below do *not* run counter to the way the Board and the Courts have previously read

the statute,[5] but rather return the Board to its original position and are fully consistent with the earlier rulings of the Seventh Circuit Court of Appeals. As a result of the rulings below there is now a *unified* interpretation of section 8(d) of the Act. Thus, there is *no* conflict between the Circuits which requires resolution by this Court.

3. The Decisions Below Are *Not* In Conflict With Any Opinion Of This Court

Next, contrary to the Petitioners' assertion, there is *no* conflict between the decisions of this Court and the rulings by the Board and Ninth Circuit below. This Court's language in *N.L.R.B. v. Lion Oil*, 352 U.S. 282 (1957), and *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956), to the effect that section 8(d)(4) "is susceptible to various interpretations" and that the Court should avoid a "narrowly literal construction of the words of the statute" (352 U.S. at 288 citing 320 U.S. at 285-286) did *not* involve the issue presented in this case—namely, the rights and obligations of the non-initiating party where the initiating party has defaulted on its obligations to notify the mediation services. The Seventh Circuit Court of Appeals in *N.L.R.B. v. Peoria Painting, supra*, specifically considered the statements of this Court in *Lion Oil* and *Mastro Plastics* and correctly concluded that this Court's pronouncements did not require the distorted construction of the language of the Act again being sought by the Petitioners herein. The Seventh Circuit declared in this regard:

> We recognize . . . that other aspects of section 8(d) and especially section 8(d)(4) are "susceptible to various interpretations" and "subject to ambiguity." We are satisifed, however, that none of the ambiguities mentioned in the above citations are relevant to the issue presented in this case nor bar our reliance on the plain words of this aspect of the statute. (Citations omitted.) (500 F.2d at 57, n. 2.)

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[5] Indeed, the Petitioners' complete failure in its Petition to directly address or even advise this Court of the nature of the Seventh Circuit's previous rulings on this issue is a blatant and inexcusable omission.

Moreover, this Court in *Lion Oil* and *Mastro Plastics* simply instructed that the courts should, where possible, avoid a construction that does not further Congress' aim to "substitute collective bargaining for economic welfare . . ." As the Seventh Circuit, the Board and the Ninth Circuit now uniformly recognize, the Board's present construction of the Act still fully serves the policy of providing notification to the mediation services, but does so "in the method Congress chose to serve this purpose . . . to assign to one party, the initiating party, fixed and definite responsibility for notifying the mediation services." (*Hooker Chemicals & Plastics Corp. v. NLRB, supra* at 970.) Thus, the decisions by the Board and Ninth Circuit below are *not* in conflict with this Court's pronouncements in *Lion Oil* or *Mastro Plastics*.

4. The Rulings Below Will Not Significantly Change The Conduct Of Collective Bargaining And Therefore Do Not Warrant Review As A Significant Issue In The Administration Of The Act

Finally, the Petitioners' claims that the Board's decision as affirmed by the Ninth Circuit below will have a destabilizing effect on labor relations by encouraging labor disputes is also completely without substance. The Petitioners' view of the bargaining process is totally unrealistic. The assertion that each side will seek to avoid being the initiating party in order to be able to take economic action without having to give notice, completely ignores the fact that a vast majority of collective bargaining agreements contain termination clauses which provide for automatic renewal if neither party reopens the contract in a timely manner. Thus, if each party for some reason chose to delay reopening so as not to be the initiating party, the collective bargaining agreement would automatically renew and *no* economic action whatsoever could be taken. The Seventh Circuit in *Hooker Chemicals & Plastics Corp. v. N.L.R.B., supra* at 970, was also easily able to respond to the "first strike capability" argument again made here by the Petitioners. The Seventh Circuit declared:

> The restraint imposed on the initiating party may be viewed as an incentive to fulfill its statutory duty to give timely

notice; the initiating party need only perform its statutory duty to avoid the restraint.

The Ninth Circuit Court of Appeals below specifically found this response by the Seventh Circuit to be persuasive. (Pet., App. A at 22).

Indeed, the Petitioners' entire discussion regarding the so-called "tactical advantage" which can result from not notifying the mediation services is grossly overstated. Strikes and lockouts are economic actions that are not taken lightly due to the costs attendant with such actions, and as such normally occur only after a clearly recognizable breakdown in contract negotiations. Therefore, strikes and lockouts are rarely "quickie" surprise actions.[6] The fallacy of the Petitioners' argument that the Board's decision will promote economic strife is most easily seen by the fact that the Board's ruling below is simply a return to the position the Board held prior to 1974 and is in accord with the status of the law as it has existed without interruption in at least the jurisdiction of the Seventh Circuit Court of Appeals. Petitioners can point to *no* showing that any of the parade of horribles it now envisions had existed prior to 1974, or that labor relations for the past dozen years have been more unstable or that "quickie" disputes have been more prevalent in the jurisdiction of the Seventh Circuit Court of Appeals. As such, no significant issue warranting review is presented by this case.

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[6] Contrary to Petitioners' implication, neither the Board nor the Ninth Circuit's opinion affected the *additional* language included in the final paragraph of section 8(d) of the Act, which addresses the special consequences of employees striking before proper notice is given.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be denied.

DATED: April 18, 1986.

Respectfully submitted,

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(Appendix A follows)

APPENDIX A

The relevant provisions of the Labor Management Relations Act, 1947, as amended (61 Stat. 136, 37 Stat. 519, 88 Stat. 395, 29 U.S.C. §§ 151-168), are as follows:

* * *

UNFAIR LABOR PRACTICES

Section 8(a) [29 U.S.C. § 158(a)] It shall be an unfair labor practice for an employer—

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies

any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . .

No. 85-1594

Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, ETC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that the requirement of Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), that a party must notify federal and state mediation services and then wait 30 days before implementing its final contract proposal or taking economic action, applies only to the party that initiated negotiations to terminate or modify an existing contract and not to the noninitiating party.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 779 F.2d 552. The decision and order of the National Labor Relations Board (Pet. App. C1-C15), including the decision of the administrative law judge (Pet. App. B1-B69), are reported at 274 N.L.R.B. No. 17.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1985. The petition for a writ of certiorari was filed on March 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. II) 151 *et seq.*, are set forth at Pet. App. D1-D6.

STATEMENT

1. Respondent United Artists Communications, Inc. (the Company)[1] operates movie theaters in southern California and Arizona (Pet. App. B6). Petitioner, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of District 2, represents the Company's projectionists in those areas in two separate bargaining units (*id.* at B7-B9, C4).[2] The most recent contract covering both units was due to expire on January 31, 1982 (Pet. App. B9, C4).

On December 1, 1981, petitioner wrote to the Company requesting negotiations for a new contract to take effect upon the expiration of the southern California unit contract. In early summer 1981, peti-

---

[1] The Company intervened in the court of appeals and accordingly is a respondent in this Court.

[2] The southern California employees are represented by District 2 and its constituent Locals 215, 297, 504, 521, 709 and 702. The Arizona employees are represented by District 2 and its constituent Local 294. Pet. App. B7-B9, C4.

tioner formally requested negotiations for a new contract in the Arizona unit. Pet. App. C4. The parties later entered into joint bargaining negotiations covering both units (they met 16 times over several months in 1982) (*id.* at B9-B10, C5). Although the parties reached agreement on some issues, they were unable to reach agreement on others, including the Company's proposal to reduce the number of projectionists, and proposals concerning wages and a "buy out" plan for employees whose jobs would be eliminated (*id.* at B14-B19, C5).

Following a bargaining impasse and notice to petitioner in September 1982, the Company unilaterally implemented its final contract offer covering the southern California unit on October 11, 1982. The same sequence obtained in Arizona, where the Company sent notice to petitioner in November 1982 and implemented its final offer on December 6, 1982. Petitioner immediately called a strike in each unit in response to the Company's implementation of its final offer (Pet. App. B9-B11, B19-B21, B24-B30, C5-C6). Neither petitioner nor the Company formally notified the Federal Mediation and Conciliation Service (FMCS) or state mediation agencies of the existence of a bargaining dispute until the Company gave written notice of the dispute to FMCS and to the appropriate state agencies on January 26, 1983 (*id.* at B11-B12, C6).[3]

2. Upon charges filed by petitioner, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the

[3] The FMCS had informally learned of the dispute shortly before November 1, 1982, and an FMCS mediator had unofficially participated in bargaining sessions in November 1982 and January 1983 (Pet. App. A7-A8).

Act, 29 U.S.C. 158(a)(5) and (1), by implementing its final offers without waiting for 30 days after providing notice of the dispute to federal and state mediation services. The Board overruled the administrative law judge. It concluded that the Company did not violate the Act and accordingly dismissed the complaint (Pet. App. C1-C15).

The Board held that petitioner, as the party initiating the bargaining for a new contract, bore the burden under Section 8(d) of the Act, 29 U.S.C. 158(d), of timely notifying state and federal mediation services of the existence of a bargaining dispute, and that petitioner's failure to do so did not preclude the Company from exercising its normal right to implement its last best offer following a bargaining impasse. In so holding, the Board overruled its decisions in *Peoria Chapter of Painting & Decorating Contractors*, 204 N.L.R.B. 345 (1973), enforcement denied, 500 F.2d 54 (7th Cir. 1975), and *Hooker Chemicals & Plastic Corp.*, 224 N.L.R.B. 1535 (1976), enforcement denied, 573 F.2d 965 (7th Cir. 1978). In those earlier cases, the Board had required a noninitiating party to wait 30 days following an untimely mediation notice before taking economic action (Pet. App. C3). Accepting the reasoning of the Seventh Circuit, which denied enforcement in both cases, the Board concluded that "the concept of shifting the burden of filing the 8(d)(3) notice of dispute to the noninitiating party in order to establish a uniform 30-day mediation requirement is a matter of policy that simply is not reflected in the statutory language of Section 8(d)" (Pet. App. C11). Rather, the Board agreed with the Seventh Circuit that "the wording of Section 8(d) and its legislative history indicate that the method Congress chose to serve the

purpose of facilitating the involvement of the mediation services 'was to assign to one party, the initiating party, a fixed and definite responsibility for notifying the mediation services' " (Pet. App. C12 (quoting *Hooker Chemical Corp.* v. *NLRB*, 573 F.2d at 970)).

3. The court of appeals affirmed the Board's order dismissing the complaint (Pet. App. A1-A22). The court agreed that the Board's construction is consistent with the language, legislative history, and policies of Section 8(d) (Pet. App. A11-A22).

ARGUMENT

Petitioner contends that the Board erred in holding that the Company was permitted to implement its final contract offer following the parties' bargaining impasse without first notifying federal and state mediation services and waiting at least 30 days thereafter before taking any action. As the court of appeals found, and as we show below, the Board reasonably concluded that the notice and 30-day waiting period requirement of Section 8(d) of the Act, 29 U.S.C. 158(d), applies only to the party initiating contract negotiations (in this case, the union), and thus the construction is entitled to acceptance. See *Pattern Makers' League* v. *NLRB*, No. 83-1894 (June 27, 1985), slip op. 5; *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960 (Mar. 21, 1984), slip op. 6. There is no conflict in the circuits on this issue. Accordingly, review by this Court is unwarranted.

1. Section 8(d) of the Act provides, that, where there is in effect a current collective bargaining contract,

> the duty to bargain collectively shall * * * mean that no party to such contract shall terminate or

modify such contract, unless the party desiring such termination or modification—

> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof * * *;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract * * *;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes * * * provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later * * *.

The provisions of Section 8(d) thus establish a procedure for parties to follow in bargaining for a new or modified contract. First, the party desiring to negotiate a new contract (the initiating party) is required by Section 8(d)(1) to serve the initial bargaining notice on the other party (the noninitiating party). The initiating party is then required by Section 8(d)(2) and (3) to offer to bargain and to notify mediation services within 30 days after the initial bargaining notice required by Section 8(d)(1) if no agreement has been reached by that time. Finally, Section 8(d)(4) requires that the parties refrain from engaging in economic action or

changing the terms of the existing agreement at least until 60 days after the opening bargaining notice or until expiration of the contract, whichever is later. Thus, under normal operation the 60-day waiting period following the initial bargaining notice includes 30 days following a timely notice to the mediation services.

In this case, petitioner initiated the bargaining by serving a 60-day notice on the Company under Section 8(d)(1). Accordingly, petitioner was required by Section 8(d)(3) to notify federal and state mediation services of the existence of the bargaining dispute within 30 days after its notice to the Company. Petitioner failed to fulfill that statutory obligation. The Company met its obligation under Section 8(d)(4) of refraining from modifying the contract until long after the 60-day notice period and the expiration of the last agreement, and it then implemented its last offer only after having bargained in good faith to impasse. Applying the provisions of Section 8(d) in those circumstances, the Board concluded that petitioner's failure to invoke the mediation process during bargaining did not preclude the Company from taking otherwise lawful action (without notifying mediation services and waiting 30 days) when the Company had in all respects satisfied its obligations under Section 8(d)(4).

The Board explained that "it is evident from a fair reading of Section 8(d) that the notice burdens of that provision fall exclusively, in the words of the statute, on 'the party desiring such termination or modification'" (Pet. App. C11).[4] While acknowl-

[4] In *NLRB* v. *Peoria Chapter of Painting & Decorating Contractors*, 500 F.2d at 57-58, on which the Board expressly relied, the Seventh Circuit stated that:

edging that "the participation of the mediation services is clearly an important and principal policy interest embodied in Section 8(d)," the Board concluded that Congress chose to assure involvement of mediation services by expressly placing the burden of triggering that participation on the initiating party.[5] Pet. App. C11-C12.

2. Petitioner contends (Pet. 7, 9-10) that Congress placed the burden of notifying the mediation services on both parties,[6] relying on the Board's

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> [Section 8(d)] is clearly phrased in terms of a unitary sixty-day waiting period keyed to the notice provision of § 8(d)(1) or the expiration date of the contract, whichever occurs later. * * * There is no provision * * * for a bifurcated waiting period of thirty days following each of the two statutory notices when the notice to the mediators is untimely given.
>
> * * * * *
>
> Thus, once the noninitiating party has observed its duty to bargain collectively during the sixty-day period subsequent to receiving notice, it has fulfilled its duty under § 8(d), whether or not the initiating party has met its obligation under § 8(d)(3) to notify state and federal mediators.

[5] As the Seventh Circuit noted in *Hooker Chemicals & Plastics Corp.* v. *NLRB*, 573 F.2d 965, 969 (1978), "[i]n most situations, the initiating party will have a strong incentive to give timely notices," thereby serving the congressional policy of involving mediation services in bargaining disputes; therefore the Board "need not contort the statutory language" to place a notice obligation on the noninitiating party where "Congress did not so legislate."

[6] Petitioner alternatively contends (Pet. 8-9) that the "'party desiring * * * termination or modification'" (on whom Section 8(d) imposes the notice obligations) refers not to the party initiating negotiations but rather to the party that during the course of negotiations proposes actual changes in the renego-

change of position as support for that interpretation. It is well settled, however, that "[a]n administrative agency is not disqualified from changing its mind." *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978). In doing so here, "the Board has reached a fair and reasoned balance upon a question within its special competence" and "has adequately explicated the basis of its interpretation." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975). Its view is thus entitled to deference.

Petitioner's reliance (Pet. 10) on *NLRB* v. *Lion Oil Co.*, 352 U.S. 282 (1957), and *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956), for the proposition that Section 8(d) should not be interpreted literally is misplaced. Those decisions involved provisions of Section 8(d) that the Court found to be ambiguous.[7] Here, in contrast, the language of Sec-

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tiated contract—in this case the Company. The Board and the courts, however, are unanimous in the view that the "party desiring * * * termination or modification" refers to the party who starts the negotiating process by giving the initial bargaining notice, and that the mediation notice burden does not thereafter shift depending on the substantive positions taken by the parties during the negotiations themselves. See *United Furniture Workers* v. *NLRB*, 336 F.2d 738, 741 (D.C. Cir.), cert. denied, 379 U.S. 838 (1964); *NLRB* v. *Mar-Len Cabinets, Inc.*, 659 F.2d 995, 998 (9th Cir. 1981); *Hooker Chemicals*, 573 F.2d at 969-970. Indeed, it was precisely to avoid the confusion that such a rule would cause that Congress assigned a "fixed and definite responsibility" for performing the Section 8(d) notice functions to "the party who starts the process." *United Furniture Workers*, 336 F.2d at 741.

[7] *Lion Oil*, 352 U.S. at 287, 289-290, involved the interpretation of the phrase "expiration date" (of a contract) as used in Section 8(d)(4), specifically, whether that phrase could refer to a date specified for reopening and modifying the contract

tion 8(d) unambiguously places the burden to notify the mediation services on the initiating party. In *Peoria Contractors*, 500 F.2d at 57 n.2, the Seventh Circuit distinguished *Lion Oil* and *Mastro Plastics*, stating that "none of the ambiguities mentioned in the above citations are relevant to the issue presented in this case [] nor bar our reliance on the plain words of this aspect of the statute." [8] Moreover, here, unlike in *Lion Oil* and *Mastro Plastics*, reliance on the plain words of the statute would not frustrate the statutory purposes.[9] Thus, as the court

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as well as to its actual termination date. *Mastro Plastics*, 350 U.S. at 285-286, involved the question whether the limitation on "strike[s]" in Section 8(d) referred only to strikes "in relation to subjects of negotiation" or to strikes over employer unfair labor practices as well.

[8] Petitioner's reliance (Pet. 9) on *Local 219, Retail Clerks' Ass'n* v. *NLRB*, 265 F.2d 814 (D.C. Cir. 1959) and *Fort Smith Chair Co.*, 143 N.L.R.B. 514 (1963), enforced *sub nom. United Furniture Workers* v. *NLRB*, 336 F.2d 738 (D.C. Cir.), cert. denied, 379 U.S. 838 (1964), is also misplaced. In those cases the Board and the courts held that the failure of an *initiating* party to give a mediation notice and then wait 30 days before taking economic action violated Section 8(d). It was appropriate to find a violation in that situation because the initiating party had failed to fulfill an obligation that the statute clearly imposed. But, as we have shown, a noninitiating party has no such obligation under Section 8(d).

[9] In *Lion Oil*, 352 U.S. at 289, the Court concluded that, unless the phrase "expiration date" in Section 8(d)(1) were interpreted to include the date when a contract was subject to modification as well as when it was subject to termination, the statutory purpose of encouraging stable, long-term bargaining relationships would be frustrated. Similarly, in *Mastro Plastics*, 350 U.S. at 285-287, the Court concluded that interpreting the language of Section 8(d) providing for loss of employee status of participants in strikes conducted within the

explained in *Hooker Chemicals*, 573 F.2d at 970, in rejecting the same contention petitioner makes here (see Pet. 11-12):

> The restraint imposed on the initiating party may be viewed as an incentive to fulfill its statutory duty to give timely notice; the initiating party need only perform its statutory duty to avoid the restraint. Accordingly, we perceive no injustice in permitting the noninitiating party to use economic weapons after contract expiration even though the initiating party may be restrained from such actions as a result of its own defaults.[10]

60-day notice period to apply to unfair labor practice strikes, as well as economic strikes, would frustrate the bargaining process and handicap the employees during negotiations.

[10] There is no basis for petitioner's suggestion (Pet. 11 n.2) that the Board's rule will encourage parties to "jockey" for position to avoid being the initiating party. Once the appropriate notices have been given, the initiator has no different status in the negotiations than the noninitiator. There is thus no reason to engage in such "jockeying." *Weathercraft Co. of Topeka, Inc.*, 276 N.L.R.B. No. 52 (Sept. 24, 1985), did not involve any attempt to avoid initiator status for tactical advantage. Rather, the employer there initiated negotiations by sending a letter to the union, as required under Section 8(d)(1), but then took economic action without having notified the mediation services. As does petitioner here, the employer in that case sought to argue that it was not in fact the initiating party.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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